Jurisdictional Statement

No. 81-157

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1981

WERNER H. KRAMARSKY, Individually and in his capacity as Commissioner of the New York State Division of Human Rights; ANN THACHER ANDERSON, individually and in her capacity as General Counsel of the New York State Division of Human Rights; the NEW YORK STATE DIVISION OF HUMAN RIGHTS, an agency of the Executive Department of the State of New York; WILLIAM B. KROEGER, Individually and in his capacity as Chairman of the New York State Workers' Compensation Board; and the NEW YORK STATE WORKERS' COMPENSATION BOARD,

Appellants,

against

DELTA AIR LINES, INC., ALLEGHENY AIRLINES, INC., NATIONAL AIRLINES, INC., PIEDMONT AVIATION, INC., BRANIFF AIRWAYS, INC., NORTH CENTRAL AIRLINES, INC., SOUTHERN AIRWAYS, INC., EASTERN AIR LINES, INC., NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., OZARK AIR LINES, INC., AMERICAN AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., and UNITED AIR LINES, INC.,

Appellees.

WERNER H. KRAMARSKY, As Commissioner of the New York State Division of Human Rights,

Appellant,

against

BURROUGHS CORPORATION,

Appellee.

WERNER H. KRAMARSKY, As Commissioner of the New York State Division of Human Rights, the NEW YORK STATE DIVISION OF HUMAN RIGHTS, and the NEW YORK STATE HUMAN RIGHTS APPEAL BOARD,

Appellants,

against

METROPOLITAN LIFE INSURANCE COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Second Circuit

JURISDICTIONAL STATEMENT

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Questions Presented

As to all three appeals:

1. Is the New York Human Rights Law in any way repugnant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* ("ERISA")?

2. Did Congress intend ERISA, which saves from impairment, 29 U.S.C. § 1144(d), provisions of Title VII of the Civil Rights Act of 1964 preserving state fair employment laws, 42 U.S.C. §§ 2000e-5, 2000e-7, 2000h-4, to preempt the New York Human Rights Law?

3. Does *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) overrule *Minnesota Mining & Manufacturing Co.* v. *Minnesota*, 444 U.S. 1041 (1980) and *Mountain States Tel. & Tel. Co. v. Commissioner*, 445 U.S. 921 (1980)?

As to the Delta Air Lines appeal only:

4. Does ERISA preempt the New York Disability Benefits Law's requirement that employers provide benefits for pregnancy disability, except where an employer administers disability benefits in a unit separate from all other employee benefits?

Parties

The parties to the proceedings below are listed in the caption except that appellant William B. Kroeger, the current Chairman of the Workers' Compensation Board, was substituted as successor in office to original defendant Arthur Cooperman, pursuant to Fed. R. App. P. 43(e) and Rule 40.3 of the Rules of this Court.

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions	4
Statement of the Case	7
These Appeals Raise Substantial Federal Questions	12
A. ERISA Does Not Preempt the Human Rights Law	12
B. ERISA Does Not Preempt the Disability Benefits Law	17
Conclusion	20

TABLE OF AUTHORITIES

PAGE

Cases:

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) 3, 11–16, 19
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 16

Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948) 16
Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board, 41 N.Y.2d 84 (1976) 8
Bucyrus-Erie Co. v. Dept. of Industry, Labor and Human Relations, 559 F.2d 205 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980) 14, 15

Caban v. Mohammed, 441 U.S. 380 (1979) 13
Carey v. Gaslight Club of New York, Inc., 447 U.S. 54 (1980) 16
Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc., 372 U.S. 714 (1963) 16

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 8

Hicks v. Miranda, 422 U.S. 332 (1975) 12

Minnesota Mining & Mfg. Co. v. Minnesota, 444 U.S. 1041 (1980) 10–16
Mountain States Tel. & Tel. Co. v. Commissioner, 445 U.S. 921 (1980) 11–16

Oscar Mayer Co. v. Evans, 441 U.S. 750 (1979) 16

Pervel Industries, Inc. v. Connecticut Comm. on Human Rights, 603 F.2d 214 (2d Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980) 9, 14

PAGE

Railway Mail Assn. v. Corsi, 326 U.S. 88 (1945) 16

Standard Oil Co. of California v. Agsalud, 442 F. Supp. 695 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd*, 50 U.S.L.W. 3243 (Oct. 5, 1981) 18

United Federation of Teachers Welfare Fund v. State Human Rights Appeal Board, 449 U.S. 803 (1980) 13

Washington v. Yakima Indian Nation, 439 U.S. 463 (1970) 13

Westinghouse Electric Corp. v. State Human Rights Appeal Board, 60 App. Div. 2d 943 (3d Dept.), *app. dismissed*, 44 N.Y.2d 731, *app. denied*, 45 N.Y.2d 706 (1978), *cert. denied*, 439 U.S. 1073 (1979) 13

Statutes:

Federal:

Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* 16
Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* 3, 8–17, 19
29 U.S.C. § 1003(b)(3) 9, 11, 17
29 U.S.C. § 1144(a) 8, 11, 14, 15
29 U.S.C. § 1144(d) 13–16
Equal Pay Act, 29 U.S.C. § 206(d) 8
Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 8, 9, 13, 15, 16
42 U.S.C. § 2000e(k) 9, 15
42 U.S.C. § 2000e-5 13, 16
42 U.S.C. § 2000e-7 13, 15
42 U.S.C. § 2000h-4 13, 15
Railway Labor Act, 45 U.S.C. §§ 151-188 8

PAGE

Welfare and Pension Plans Disclosure Act of 1958, 29 U.S.C. § 303(b)(2) 18
28 U.S.C. § 1254(2) 3
28 U.S.C. § 1331 2
28 U.S.C. § 1337 2
28 U.S.C. § 1343(3) 2
28 U.S.C. § 1983 ..... 3, 9
28 U.S.C. § 2201 2

State:

Conn. Gen. Stat. § 31-126(g) 14
N.Y. Executive Law, Art. 15 (McKinney 1972 & Supp. 1980-1981) (Human Rights Law) 2, 8–11, 13, 16
N.Y. Workers' Compensation Law, Art. 9 (McKinney Supp. 1981-1982) (Disability Benefits Law) 3, 8-11, 17, 19
Wisconsin Fair Employment Act, Wis. Stat. §§ 111.31-111.37 14

Regulations:

Executive Order No. 11246, 3 C.F.R. 339 (1964-1965 Comp.) as amended by Executive Order No. 11375, 3 C.F.R. 684 (1966-1970 Comp.) 8

Miscellaneous:

House Conf. Rept. No. 93-1280, 93rd Cong., 2nd Sess. (1974) 18
H. Rep. No. 95-948, 95th Cong., 2nd Sess. (1978) 15
S. Rep. No. 95-331, 95th Cong., 1st Sess. (1977) 15
119 Cong. Rec. 3049-10 (1973) 15
120 Cong. Rec. 4726 (1974) 15

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WERNER H. KRAMARSKY, Individually and in his capacity as Commissioner of the New York State Division of Human Rights; ANN THACHER ANDERSON, Individually and in her capacity as General Counsel of the New York State Division of Human Rights; the NEW YORK STATE DIVISION OF HUMAN RIGHTS, an agency of the Executive Department of the State of New York; WILLIAM B. KROEGER Individually and in his capacity as Chairman of the New York State Workers' Compensation Board, and the NEW YORK STATE WORKERS' COMPENSATION BOARD,

Appellants,

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DELTA AIR LINES, INC., ALLEGHENY AIRLINES, INC., NATIONAL AIRLINES, INC., PIEDMONT AVIATION, INC., BRANIFF AIRWAYS, INC., NORTH CENTRAL AIRLINES, INC., SOUTHERN AIRWAYS, INC., EASTERN AIR LINES, INC., NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., OZARK AIR LINES, INC., AMERICAN AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., and UNITED AIR LINES, INC.,

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METROPOLITAN LIFE INSURANCE COMPANY,

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On Appeal from the United States Court of Appeals for the Second Circuit

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JURISDICTIONAL STATEMENT

Opinions Below*

The decisions of the Court of Appeals on rehearing, dated November 24, 1981, are unpublished and are reproduced at pages A-1-A12 (*Delta Air Lines, Inc., et al.* v. *Kramarsky, et al.* ["*Delta*"]; A13-A14 (*Burroughs Corp.* v. *Kramarsky* ["*Burroughs*"]) and A15-A16 Metropolitan *Life Ins. Co. v. Kramarsky, et al.* ["*Metropolitan*"]) of the Appendix. The orders of the Court of Appeals staying these decisions pending review by this Court are reproduced at pages A130-A135 of the Appendix. The decisions of the Court of Appeals dated May 11, 1981 are reported at 650 F.2d 1287 (*Delta*), 650 F.2d 1308 (*Burroughs*) and 650 F.2d 1309 (*Metropolitan*), and are reproduced at pages A23-A66, A67-A69 and A70-A72 of the Appendix, respectively. The opinion of the United States District Court for the Southern District of New York (*Delta*) is reported at 485 F. Supp. 300 and reproduced at pages A77-A102 of the Appendix. The opinion of the United States District Court for the Western District of New York (*Burroughs*) is reproduced at pages A107-A117.

Jurisdiction

The *Delta* action was brought in the United States District Court for the Southern District of New York pursuant to 28 U.S.C. §§ 1331, 1337, 1343(3) and 2201 to declare preempted and enjoin enforcement of the Human Rights Law, N.Y. Exec. Law, Art. 15 (McKinney 1972 & Supp. 1980-

* Pursuant to Rule 10.6 of the Rules of this Court, as all three decisions by the Second Circuit Court of Appeals involve closely related issues, appellants are filing a single jurisdictional statement.

1981) ("HRL") and the New York Disability Benefits Law (Workers' Compensation Law) ("DBL") § 205(3) as contrary to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq.*, as well as other federal statutes. The *Burroughs* action was brought in the United States District Court for the Western District of New York for injunctive and declaratory relief as to the HRL on the same ground, and for relief under 28 U.S.C. § 1983. The *Metropolitan* action, seeking declaratory and injunctive relief similar to that sought in *Burroughs*, was brought in the United States District Court for the Southern District of New York.

The initial judgments of the Court of Appeals were entered on May 11, 1981. Rehearing was granted on October 8, 1981, and judgments after rehearing were entered on November 24, 1981. Appellants Kramarsky, Anderson and State Division of Human Rights filed notices of appeal in all three cases on December 11, 1981, and appellants Kroeger and Workers' Compensation Board filed a notice of appeal in *Delta* on February 4, 1982. All notices of appeal were filed in the United States Court of Appeals for the Second Circuit (A121-A129).

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(2). *See Alessi* v. *Raybestos-Manhattan, Inc.*, 449 U.S. 949 (November 4, 1980) (noting probable jurisdiction over appeal from decision of Third Circuit holding state statute preempted).

Constitutional and Statutory Provisions

U.S. Const. Art. VI cl. 2:

> Supreme Law of Land
>
> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United State, shall be the Supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

ERISA, 29 U.S.C., provides in pertinent part:

> § 1002. Definitions
>
> For purposes of this subchapter:
>
> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).
>
> * * *
>
> (3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee

pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

§ 1003. Coverage

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

(b) The provisions of this subchapter shall not apply to any employee benefit plan if—

* * *

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws.

§ 1144. Other laws

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

* * *

(c) For purposes of this section:

(1) The term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term 'State' includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

Human Rights Law, N.Y. Executive Law (McKinney 1972 and Supp. 1980-1981), provides in pertinent part:

§ 296. Unlawful discriminatory practices.

1. It shall be an unlawful discriminatory practice:

(a) For an employer . . . because of the age, race, creed, color, national origin, sex or disability, or marital status of any individual . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

Disability Benefits Law, N.Y. Workers' Compensation Law (McKinney Supp. 1981-1982), provides in pertinent part:

§ 204. Disability During Employment

1. Disability benefits shall be payable to an eligible employee for disabilities . . . beginning with the eighth consecutive day of disability and thereafter

during the continuance of disability, subject to the limitations as to maximum and minimum amounts and duration and other conditions and limitations in this section and in sections two hundred five and two hundred six. . . .

2. The weekly benefit which the disabled employee is entitled to receive for disability commencing on or after July first, nineteen hundred seventy-four shall be one-half of the employee's average weekly wage but in no case shall such benefit exceed ninety-five dollars nor be less than twenty dollars; except that if the employee's average weekly wage is less than twenty dollars, his benefit shall be such average weekly wage. . . .

§ 205. No employee shall be entitled to benefits under this article:

1. for more than twenty-six weeks during a period of fifty-two consecutive calendar weeks or during any one period of disability;

* * *

3. notwithstanding any other provision of law, for a period of disability in excess of eight weeks caused by or arising in connection with a pregnancy except for a period of disability occurring as a result of a complication of such pregnancy, and the liability of the employer or the chairman as provided in this article shall be the exclusive statutory remedy of an employee for disability caused by or arising in connection with a pregnancy.

Statement of the Case

Appellees in *Delta* are fourteen major airlines ("the airlines") employing thousands of workers in New York. In July, 1977, the airlines commenced the *Delta* action against the State Division of Human Rights, its Commissioner and

General Counsel ("the Division") seeking declaratory and injunctive relief to prevent the Division from enforcing the HRL insofar as that law prohibits the airlines from discriminating in terms, conditions or privileges of employment against pregnant employees.* In December, 1977, the airlines amended their complaint to include the Workers' Compensation Board and its Chairman (the "Board") as defendants, and sought to enjoin enforcement of DBL § 205(3), which required the airlines to provide up to eight weeks of disability benefits for their pregnant employees.** The airlines alleged that both laws were preempted by ERISA, 29 U.S.C. § 1144(a).†

Effective April 29, 1979, Congress amended Title VII to provide that

> . . . women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for

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* In *Brooklyn Union Gas Co.* v. *New York State Human Rights Appeal Board*, 41 N.Y.2d 84 (1976), the New York Court of Appeals held that the HRL's prohibition against sex discrimination in employment includes discrimination on the basis of pregnancy. By contrast, in 1976 this Court concluded that the prohibition against sex discrimination in Title VII of the Civil Rights Law of 1964, 42 U.S.C. §§ 2000-e, *et seq.*, did not prohibit exclusion from a disability benefits plan of disabilities related to pregnancy. *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976).

** L. 1977, ch. 675, § 29, effective August 3, 1977. Effective June 29, 1981, § 205(3) was repealed (L. 1981, ch. 352), so that now the DBL treats disabilities related to pregnancy like other disabilities. Thus, New York employers are required to provide up to 26 weeks of benefits for all disabilities, including those connected with pregnancy.

† The airlines also alleged preemption of both statutes by the Railway Labor Act, 45 U.S.C. §§ 151-188 (1976), and alleged conflicts with Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976), the Equal Pay Act, 29 U.S.C. § 206(d) (1976) and Executive Order No. 11246, 3 C.F.R. 339 (1964-1965 Comp.) (Sept. 24, 1965) as amended by Executive Order No. 11375, 3 C.F.R. 684 (1966-1970 Comp.) (Oct. 13, 1967). These claims, resolved against the airlines, are not before this Court.

> all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . . Pub. L. No. 95-555 (codified at 42 U.S.C. § 2000e[k]).

As a result, after April 29, 1979, the HRL and Title VII both prohibited discrimination based on pregnancy, and the District Court held "the airlines' claims for relief are rendered moot" from the effective date of the amendment. (A80).

On January 28, 1980, the District Court issued its opinion, and on March 19, 1980, entered an order enjoining the Division from enforcing the HRL with respect to pregnancy benefits during the relevant time period, and dismissing the airlines' preemption claims regarding DBL § 205 (3). The District Court held that the HRL was preempted by ERISA, relying exclusively on the Second Circuit's summary affirmance in *Pervel Industries, Inc.* v. *Connecticut Comm. on Human Rights*, 603 F.2d 214 (2d Cir. 1979), *affirming* 468 F. Supp. 490 (D. Conn. 1978), *cert. denied*, 444 U.S. 1031 (1980) (*"Pervel"*). In addition, the District Court found that the airlines' pregnancy disability plans were plans maintained "solely for the purpose of complying with" DBL § 205(3), and, pursuant to 29 U.S.C. 1003(b)(3), were specifically exempt from ERISA's coverage.

Burroughs was filed on October 5, 1979, seeking injunctive relief and a declaration that the HRL was preempted by ERISA and relief under 28 U.S.C. § 1983. The District Court (Burke, J.) declared the HRL preempted by ERISA, and enjoined the Division from "prosecuting and en-

forcing" complaints filed by female employees of Burroughs between January 1, 1975 and April 1, 1979, who had charged that pregnancy-related disallowance of fringe benefits constituted sex discrimination in terms, conditions and privileges of employment (A103, A107).

Metropolitan, filed February 13, 1980, alleged that the HRL was preempted by ERISA and sought, in addition to declaratory relief, a preliminary and permanent injunction restraining the Division from proceeding on complaints filed by employees of Metropolitan who suffered pregnancy disability. The District Court (KNAPP, J.) granted the preliminary injunction sought in the complaint (A118).

The Division appealed to the United States Court of Appeals for the Second Circuit in each of the three cases from the District Court's order striking down the HRL. The airlines cross-appealed from that portion of the *Delta* order upholding DBL § 205(3).

On May 11, 1981, the Second Circuit reversed the District Courts' judgments enjoining enforcement of the HRL. The Second Circuit ruled that it was bound by this Court's dismissal, for want of a substantial federal question, of appeals from decisions of two state courts holding that ERISA did not preempt fair employment legislation prohibiting employers from discriminating in terms, conditions or privileges of employment against pregnant employees. *Minnesota Mining & Manufacturing Co.* v. *Minnesota*, 444 U.S. 1041 (1980), *dismissing appeal from* 289 N.W.2d 396 (Minn. 1979) (*"Minnesota"*); *Mountain*

States Tel. & Tel. Co. v. *Commissioner*, 445 U.S. 921 (1980), *dismissing appeal from* 608 P.2d 1047 (Mont. 1979) (*"Mountain States"*) (A23, A67, A70).

The Court of Appeals also reversed the District Court's ruling that DBL § 205(3) was not preempted by ERISA. The court held that DBL §205(3) "relates to" employee benefit plans within the meaning of 29 U.S.C. § 1144(a), and that the airlines' pregnancy disability plans were not plans "maintained solely for the purpose of complying with" a state disaibility insurance law within the meaning of 29 U.S.C. § 1003(b)(3) unless they were maintained in an administrative unit separate from all other employee benefits. (A64). Absent such a separate administrative unit, the court declared "the DBL . . . preempted in its entirety . . . and . . . wholly unenforceable." (A66).

The airlines, Burroughs, Metropolitan and the Board petitioned for rehearing. The Court of Appeals granted rehearing on October 8, 1981 to determine whether its prior ruling regarding preemption of the HRL should be reversed in light of this Court's intervening decision in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (A17, A19, A21). On November 24, 1981, the court ruled *Alessi* to be a "doctrinal development" sufficient to deprive this Court's decisions in *Minnesota* and *Mountain States* of all precedential weight (A5). The Court of Appeals vacated its May 11, 1981 decision sustaining the HRL, held Section 296 of the HRL preempted by ERISA, and affirmed the injunctions granted by the District Courts. The Court of Appeals reaffirmed, in all respects, its ruling regarding preemption of the DBL (A12).

On January 22, 1982, the Court of Appeals granted both the Division's and the Board's requests for a stay of its November 24, 1981 decision, pending review by this Court (A130-A135).

These Appeals Raise Substantial Federal Questions.

A. ERISA Does Not Preempt the Human Rights Law.

The court below erroneously read this Court's decision in *Alessi* as a "doctrinal development," *see Hicks* v. *Miranda*, 422 U.S. 332, 344-45 (1975), directing lower courts that *Minnesota* and *Mountain States* are no longer binding.

In *Alessi*, a state statute was declared preempted by ERISA because it directly eliminated one method of calculating pension benefits—integration—that Congress intended ERISA to preserve. 451 U.S. at 514-517. Methods of calculating and paying pension benefits—at issue in *Alessi* —are explicitly regulated by ERISA. By contrast, in *Minnesota* and *Mountain States* this Court upheld decisions that ruled that a state may apply its fair employment legislation to employers subject to ERISA.* ERISA is silent as to discrimination; its legislative history reflects intent that employers remain subject to Title VII and to state counterparts therein recognized and preserved. *See*

* By characterizing *Minnesota* and *Mountain States* as "ruling that ERISA does not preempt state statutes that regulate the nature of the benefits an employer must provide in his employee benefit plans" (A5), the court below elided the distinction between those cases and *Alessi*. Fair employment laws do not mandate provision of specific benefits to employees, but prohibit discrimination in administration of benefits; they do not regulate the nature of the benefits themselves. The state statute preempted in *Alessi*, on the other hand, directly regulated the calculation of pension benefits.

infra at 15. *Alessi*, *Minnesota* and *Mountain States* are not analogous, and the Court of Appeals erred in concluding from *Alessi* that this Court wished *Minnesota* and *Mountain States* to be disregarded.

This Court is free, after as before *Alessi*, to give plenary consideration to the question resolved summarily in *Minnesota* and *Mountain States*, *see Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979) and cases cited; *see also Caban* v. *Mohammed*, 441 U.S. 380, 390 n.9 (1979), but *Alessi* does not predetermine the outcome of such consideration. *Alessi* neither precludes adherence to *Minnesota* and *Mountain States* nor compels departure. *See* 451 U.S. at 525 n.21. This Court can preserve its decisions in *Minnesota and Mountain States* by summarily reversing, as to this issue, the decisions here on appeal.*

Furthermore, by reading *Alessi* to displace *Minnesota* and *Mountain States*, the court below revived a conflict, settled by those cases, between decisions of the Second and Seventh Circuits as to whether ERISA preempts state laws forbidding discrimination. The court below declared that ERISA preempts the HRL and rejected the Division's "double savings clause argument" that because ERISA does not "alter, modify or supersede" Title VII, *see* 29 U.S.C. § 1144(d), and because Title VII preserves state fair employment laws, 42 U.S.C. §§ 2000e-5, 2000e-7, *see* 42 U.S.C. § 2000h-4, the HRL is saved from preemption.

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* This Court, prior to *Alessi*, ruled summarily that ERISA does not preempt the HRL. United Federation of Teachers Welfare Fund v. New York State Human Rights Appeal Board, 449 U.S. 803 (1980) (dismissing for want of substantial federal question appeal from contempt adjudication); *see also* Westinghouse Electric Corp. v. New York State Human Rights Appeal Board, 60 App.Div.2d 943 (3rd Dept), *app. dismissed*, 44 N.Y.2d 731, *app. denied*, 45 N.Y. 2d 706 (1978), *cert. denied*, 439 U.S. 1073 (1979).

Rejecting the "double savings clause argument," the court relied on its prior rejection of this argument in *Pervel*. There the Second Circuit held that ERISA preempts a Connecticut statute prohibiting an employer from denying an employee "who is disabled as a result of pregnancy any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to a plan maintained by the employer." Conn. Gen. Stat. § 31-126(g).

By contrast, in *Bucyrus-Erie Co.* v. *Dept. of Industry, Labor and Human Relations*, 559 F.2d 205 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980) ("*Bucyrus-Erie*"), the Court of Appeals for the Seventh Circuit held that ERISA did not preempt the prohibition in the Wisconsin Fair Employment Act, Wis. Stat. §§ 111.31-111.37, of discrimination in terms, conditions or privileges of employment. That court adopted the "double savings clause argument" rejected by the Second Circuit, concluding (559 F.2d at 210):

> the preemption of State fair employment laws would operate to "alter, amend, modify, invalidate, impair or supersede" another federal "law, rule or regulation" in contravention of an express exception in section 514 of ERISA. 29 U.S.C. § 1144(d).

Alessi did not mention either *Minnesota, Mountain States, Pervel or Bucyrus-Erie*. Rather, *Alessi* addressed the application to a state statute of subsection (a) of ERISA's supersedure clause, 29 U.S.C. § 1144(a), without discussing its interaction with subsection (d). This Court had no occasion in *Alessi* to consider whether subsection

(d), in saving a federal statute that itself preserves state counterparts, saves a particular state statute which relates to an employee benefit plan covered by ERISA. At most *Alessi* could impinge upon *Minnesota* and *Mountain States* only with respect to subsection (a), not with respect to subsection (d).

The conclusion reached by the Seventh Circuit in *Bucyrus-Erie* is thus untouched by *Alessi*, and finds more basis in logic and in the language and legislative history of ERISA than the conclusion reached by the Second Circuit below.

The courts below have suggested that preemption by ERISA of state antidiscrimination laws ended when Title VII was amended, P.L. 95-555, 42 U.S.C. § 2000e-(k), to cover pregnant workers. This suggestion implies, despite rejection by these courts of the "double savings clause argument," that Title VII can, after all, save a state law from ERISA preemption, albeit only to the extent the state statute resembles Title VII. This limited double savings clause theory would impair provisions of a federal statute, *see* 42 U.S.C. §§ 2000e-7, 2000h-4, which preserve state legislation providing greater protection from discrimination than Title VII. Congress, in enacting ERISA and amending Title VII, did not intend to eliminate state police power to provide protection beyond that afforded by federal law. Instead, the legislative history of ERISA and of the amendment to Title VII shows that Congress did not intend to preempt state antidiscrimination legislation at all. *See* 119 Cong. Rec. 30409-10 (1973); 120 Cong. Rec. 4726 (1974); S. Rep. No. 95-331, 95th Cong., 1st Sess. 3 n.1 (1977); H.Rep. No. 95-948, 95th Cong., 2nd Sess. 11 (1978).

Preemption of state statutes forbidding discrimination would affect our federal system. Such statutes enjoy a history of protection by this Court from arguments based on preemption. *See, e.g., Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.*, 372 U.S. 714 (1963); *Bob-Lo Excursion Co.* v. *Michigan*, 333 U.S. 28 (1948); *Railway Mail Assn.* v. *Corsi*, 326 U.S. 88 (1945). If that protection is withdrawn by reading *Alessi* to overrule *Minnesota* and *Mountain States*, police power could be reduced over discrimination of any sort in terms, conditions or privileges of employment embodied in ERISA-covered plans. For example, a charge of discrimination as to race, creed, color, national origin or sex in administration of benefits under a plan covered by ERISA perhaps could not be deferred under Title VII, *see* 42 U.S.C. § 2000e-5, if states did not retain power "to grant relief" within 42 U.S.C. § 2000e-5(c). If such a complaint alleged age discrimination it might be accepted by the EEOC under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, *compare Id.* § 631(a) *with* N.Y. Exec. Law § 296.3-a(a), but resort to state remedies might be eliminated. *Cf. Oscar Mayer Co.* v. *Evans*, 441 U.S. 750 (1979). If a complaint alleged discrimination on any basis protected by state but not federal law, the complainant might have no remedy whatsoever. Federal statutes would be impaired, *cf.* 29 U.S.C. § 1144(d), *see Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974); *Carey* v. *Gaslight Club of New York, Inc.*, 447 U.S. 54, 63-65 (1980), and matters of legitimate and longstanding state concern would lie beyond state power. The pregnant worker would not be the only victim.

B. ERISA Does Not Preempt the Disability Benefits Law.

The Court of Appeal's decision that ERISA preempts New York's Disability Benefits Law except if, by chance, an employer creates an autonomous unit to provide statutory disability benefits, contradicts ERISA's plain language and overrides Congress' clear intent to preserve states' disability laws (A64-A65).

ERISA by its terms does not preempt state laws relating to employee benefit "plan[s] maintained solely for the purpose of complying with applicable . . . disability insurance laws." 29 U.S.C. § 1003(b)(3). As the District Court found, the airlines provide pregnancy disability benefits to comply with DBL § 205(3),* and thus the portions of their benefit plans providing these benefits are exempt from ERISA coverage (A90). The Court of Appeals ignored this finding and instead made the form in which benefits are administered the factor determining preemption. This construction, that requires a separate, autonomous plan for disability benefits in order to preserve state disability laws, finds no support in the statutory language.

What makes the Court of Appeal's reading of ERISA particularly untenable is that Congress explicitly took

* The DBL requires all covered employers (DBL § 202) to provide up to twenty-six weeks of benefits ($95/week or one-half of the weekly salary, whichever is less) in a one-year period for all non-job-related disabilities. Employers are required to provide proof of coverage to the Workers' Compensation Board and may choose any of the following methods (DBL § 211): purchasing insurance from the New York State Insurance Fund; purchasing insurance from a private insurer; self-insuring, provided the employer posts adequate financial security with the Board; or a plan, approved by the Board, that provides benefits at least as favorable as those required by the DBL.

care to preserve *state* legislation in three areas: unemployment insurance, workers' compensation, and disability benefits. The reason is clear: ERISA does not contain any substantive benefit requirements, and therefore states must be free to provide for their workers' welfare in these areas. The Court of Appeals recognized that Congress had intended to achieve this result, yet it reached a decision which creates a void where none was meant to exist (A58):

> . . . We recognize that many aspects of benefits plans generally, and of welfare benefits plans in particular, will go unregulated under this regime of broad preemption, and that § 514(a) may therefore permit abuses that Congress might otherwise have wished to avert. . . . Thus, ERISA ordinarily does not permit "independent and concurrent obligations" under federal and state law. Under ERISA, federal law will govern, even in those instances where federal governance effectively means no governance, save where Congress has clearly declared otherwise.

However, Congress "has clearly declared otherwise" regarding state disability laws.* This Court should give plenary consideration to this appeal to correct a result so at odds with express Congressional purpose.

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* See House Conf. Rpt. No. 93-1280, *U.S. Code Cong. & Admin. News* 5038, 5039, 5043, 5076, 5147, 5162 (93d Cong. 2d Sess. 1974). These "narrow exceptions" to premption (*id.*, at 5188, statement of Sen. Williams) for the three types of state laws were well understood by Congress. ERISA's predecessor statute, the Welfare and Pension Plans Disclosure Act of 1958, P.L. 85-836, contained an exemption for state laws virtually identical to § 1003(b)(3). *See* 29 U.S.C. § 303(b)(2) (1975). When this law was enacted, Congress was cognizant of the disability benefits laws existing in four states—including New York—and expressly intended to preserve these laws. *See* Standard Oil Co. of California v. Agsalud, 442 F. Supp. 695, 699-700, 704-706 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd*, 50 U.S.L.W. 3243 (October 5, 1981).

This Court's recent decision in *Alessi* is not to the contrary. There the state, in the guise of a Workers' Compensation Law, attempted to prohibit a method for calculating *pension* benefits clearly intended by Congress to be permissible under ERISA. Here, not only does the DBL not affect the specific subject with which ERISA is concerned—fiduciary obligations of benefit plans—but it involves payment of amounts of *disability* benefits, specifically intended to be preserved.

The implications of the Court of Appeal's decision are compelling evidence that its construction of ERISA was never intended by Congress, and should not stand. As a result of the Court of Appeal's decision, a New York employer who provides benefits in addition to disability benefits (for example, health insurance, accident insurance, vacation benefits or prepaid legal services) is entirely relieved of any obligation to provide the minimum amount of disability benefits required by the DBL so long as the employer administers these benefits in one unit or office, or insures payment with a single insurer.* Thus, preemption depends neither on the requirements of the DBL, nor on the language of ERISA, but on the ingenuity of the employer. The possibilities are limitless for creative action by employers to avoid the New York legislature's mandate that New York's workers must have some minimal protection in the event they are disabled.

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* For example, an employer who processes employee health insurance and disability benefits claims in one benefits office would no longer be required to provide the stautory amount of disability benefits to employees. Similarly, an employer who provides some disability benefits but pays for them *and* health insurance by purchasing a single insurance policy, may no longer be limited to collecting a maximum contribution of 30 cents per week from its employees. DBL § 209(3).

Conclusion

For the reasons stated above, the decisions below should be summarily reversed or probable jurisdiction noted.

Respectfully submitted,

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Appendix

81-1578

No.

Office - Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1981

WERNER H. KRAMARSKY, *etc., et al.*,
Appellants,

v.

DELTA AIR LINES, INC., *et al.*,
Appellees.

WERNER H. KRAMARSKY, *etc.*,
Appellant,

v.

BURROUGHS CORPORATION,
Appellee.

WERNER H. KRAMARSKY, *etc., et al.*,
Appellants,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Second Circuit

APPENDIX TO THE JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

PAGE

Opinion on Rehearing, November 24, 1981—Delta Air Lines, Inc. A1

Opinion on Rehearing, November 24, 1981—Burroughs Corporation A13

Opinion on Rehearing, November 24, 1981—Metropolitan Life Insurance Company A15

Order of Court of Appeals Granting Rehearing—Delta Air Lines, Inc. A17

Order of Court of Appeals Granting Rehearing—Burroughs Corporation A19

Order of Court of Appeals Granting Rehearing—Metropolitan Life Insurance Company A21

Opinion of the Court of Appeals, May 11, 1981—Delta Air Lines, Inc. A23

Opinion of the Court of Appeals, May 11, 1981—Burroughs Corporation A67

Opinion of the Court of Appeals, May 11, 1981—Metropolitan Life Insurance Company A70

Order and Judgment of the District Court, March 19, 1980—Delta Air Lines, Inc. A73

Opinion of the District Court, January 28, 1980—Delta Air Lines, Inc. A77

PAGE

Correcting Memorandum, Judge Lasker, Dated February 4, 1980 ..... A102

Judgment of the District Court, January 14, 1980—Burroughs Corporation A103

Stipulation, Dated January 11, 1980, Burroughs Corporation A105

Decision and Order of the District Court, November 14, 1979—Burroughs Corporation A107

Order of the District Court, February 14, 1980—Metropolitan Life Insurance Company A118

Notice of Appeal—Delta Air Lines, Inc. A121

Notice of Appeal—Delta Air Lines, Inc. A123

Notice of Appeal—Burroughs Corporation A126

Notice of Appeal—Metropolitan Life Insurance Company A128

Notice of Motion for Stay Pending Appeal A130

Notice of Motion for Stay Pending Appeal—Delta Air Lines, Inc. A134

Opinion on Rehearing, November 24, 1981 — Delta Air Lines, Inc.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

On Rehearing

No. 18 September Term, 1980

(Originally Argued
September 25, 1980 Decided May 11, 1981)

(Petition for rehearing
filed June 8, 1981) Decided November 24, 1981

Docket No. 80-7179

DELTA AIR LINES, INC., ALLEGHENY AIRLINES, INC., NATIONAL AIRLINES, INC., PIEDMONT AVIATION, INC., BRANIFF AIRWAYS, INC., NORTH CENTRAL AIRLINES, INC., SOUTHERN AIRWAYS, INC., EASTERN AIR LINES, INC., NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., OZARK AIR LINES, INC., AMERICAN AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., and UNITED AIRLINES, INC.,

Plaintiffs-Appellees-Cross-Appellants,

v.

WERNER H. KRAMARSKY, Individually and in his capacity as Commissioner of the New York State Division of Human Rights; ANN THACHER ANDERSON, Individually and in her capacity as General Counsel of the New York State Division of Human Rights; THE NEW YORK STATE DIVISION OF HUMAN RIGHTS, an agency of the Executive Department of the State of New York; ARTHUR COOPERMAN, Individually and in his capacity as Chairman of the New York State Workmen's Compensation Board; and the NEW YORK STATE WORKMEN'S COMPENSATION BOARD,

Defendants-Appellants-Cross-Appellees.

Opinion on Rehearing, Delta Air Lines, Inc.

Before: MOORE and KEARSE, *Circuit Judges*, and TENNEY, *District Judge.**

On rehearing as to whether the panel's prior ruling in this case, reported at 650 F.2d 1287, that § 296 of the New York Human Rights Law ("HRL") was not preempted by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1381 (1976), should be reversed in light of the Supreme Court's decision in *Alessi* v. *Raybestos-Manhattan, Inc.*, 101 S. Ct. 1895 (1981), *held*: HRL § 296 is preempted by ERISA.

Judgment of the district court affirmed in part, vacated in part, and remanded.

J. Stanley Hawkins, Dean Booth, Keith M. Wiener, Kilpatrick & Cody, Atlanta, Georgia, *for Plaintiffs-Appellees-Cross-Appellants Delta Air Lines, Inc., et al.*

Ann Thacher Anderson, General Counsel, State Division of Human Rights, New York, N.Y., *for Defendants-Appellants Werner H. Kramarsky, et al.*

Constance L. Dupre, Acting General Counsel, Philip B. Sklover, Acting Associate General Counsel, Vincent Blackwood, Assistant General Counsel, Carol Cresswell Moschandreas, Washington, D.C., *for Equal Employment Opportunity Commission as amicus curiae.*

---

* Honorable Charles H. Tenney, Senior Judge of the United States District Court for the Southern District of New York, sitting by designation.

Opinion on Rehearing, Delta Air Lines, Inc.

KEARSE, *Circuit Judge:*

Our original opinion on this appeal, reported at 650 F.2d 1287, held, *inter alia*, that § 514(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a) (1976), did not preempt New York's Human Rights Law ("HRL"), N.Y. Exec. Law § 296 (McKinney 1972 & Supp. 1980-1981), insofar as the HRL required employers who maintained employee disability benefit plans to provide benefits for disability due to pregnancy during the period from December 30, 1976, to April 29, 1979. We granted the rehearing petition of plaintiffs-appellees, Delta Air Lines, Inc., et al. in order to reconsider that holding[1] in light of the Supreme Court's subsequent decision in *Alessi* v. *Raybestos-Manhattan, Inc.*, 101 S. Ct. 1895 (1981). At issue here is whether, and to what extent, *Alessi* affects the precedential weight to be accorded the Supreme Court's earlier dismissal, for want of a substantial federal question, of an appeal in *Minnesota Mining & Manufacturing Co.* v. *Minnesota*, 444 U.S. 1041 (1980), *dismissing appeal from* 289 N.W.2d 396 (Minn. 1979) (hereinafter "*Minnesota*"), the decision that compelled our conclusion that ERISA did not preempt the HRL. Believing that *Alessi* has effectively overruled *Minnesota*, we now vacate so much of our prior opinion as held that

1. To the same limited extent we also granted the rehearing petitions of the employers in *Burroughs Corp.* v. *Kramarsky*, 650 F.2d 1308, and *Metropolitan Life Ins. Co.* v. *Kramarsky*, 650 F.2d 1309, which were decided with, and which relied on, our prior decision in this action. Our decisins in *Burroughs*, No. 80-7127, and *Metropolitan Life*, No. 80-7185, are modified today, by separate orders, in accordance with our decision in the present case.

§ 514(a) of ERISA did not preempt § 296 of the HRL, and we affirm the judgment of the district court insofar as it enjoined enforcement of the HRL.

The Summary Dismissal in Minnesota

In *Minnesota,* the Minnesota Supreme Court had held that a Minnesota statute that required employers to treat pregnancy the same as other disabling conditions for purposes of disability benefit plans, was not preempted by ERISA. The state court's decision was appealed to the United States Supreme Court pursuant to 28 U.S.C. § 1257(2) (1976), requiring the Court to rule on the merits of the state court's judgment. The Supreme Court, declining to receive briefs or hear oral argument, dismissed the appeal for want of a substantial federal question, thus leaving the state court judgment intact. As discussed in our prior opinion, familiarity with which is assumed, Supreme Court dismissals for want of a substantial federal question "are judgment on the merits . . . with respect to the 'precise issues presented [to the Supreme Court] and necessarily decided' by it in disposing of the appeal." 650 F.2d at 1295 (quoting *Mandel* v. *Bradley,* 432 U.S. 173, 176 (1977) (per curiam)). In the absence of any further enlightenment by the Court, such judgments must be followed by the lower courts, *e.g., Hicks* v. *Miranda,* 422 U.S. 332, 344 (1975). Thus we were compelled to view the Supreme Court as having ruled in *Minnesota* that ERISA did not preempt the *Minnesota* statute. Since the New York HRL is virtually identical to the *Minnesota* statute, we concluded that under the rule of *Minnesota* ERISA did not preempt HRL § 296.

Nevertheless, summary decisions of the Supreme Court are binding on the lower courts only "until such time as the Court informs [them] that [they] are not." *Hicks* v. *Miranda*, *supra*, 422 U.S. at 345 (quoting *Doe* v. *Hodgson*, 478 F.2d 537, 539 (2d Cir.), *cert. denied*, 414 U.S. 1096 (1973), *application denied*, 500 F.2d 1206 (2d Cir. 1974)). Such information obviously may come in the form of an express overruling of a prior summary decision, but it need not be so direct. As the Court has recognized, even absent an explicit statement that the decision has been overruled, departure from a summary precedent may be warranted on the basis of "doctrinal developments" in the Court's subsequent decisions. *Hicks* v. *Miranda*, *supra*, 422 U.S. at 344-45 (quoting *Port Authority Bondholders Protective Committee* v. *Port of New York Authority*, 387 F.2d 259, 263 n.3 (2d Cir. 1967)). *See also Heaney* v. *Allen*, 425 F.2d 869, 870-71 (2d Cir. 1970). Since in *Alessi* the Supreme Court did not state in terms that it was overruling *Minnesota*, nor, indeed, even mention *Minnesota*, the questions here are whether *Alessi* is a "doctrinal development" that invalidates *Minnesota*, and, if it is, whether it compels us to hold that the HRL was preempted. We answer both questions in the affirmative.

Alessi *as a Doctrinal Development*

We regard the teaching of *Alessi* as incompatible with *Minnesota*'s ruling that ERISA does not preempt state statutes that regulate the nature of the benefits an employer must provide in his employee benefit plans. *Alessi* involved a different type of regulation, but the starting

point for its analysis is that which must be used here, and the course and final resting place of its analysis is no less instructive here.

The employee benefit plans challenged by retired employees in *Alessi* integrated pension benefits with workers' compensation benefits; they provided that an employee's retirement benefits would be reduced by an amount equal to any workers' compensation awards for which the retiree was eligible. The statute at issue was the New Jersey workers' compensation law, which forbade such reductions with respect to retirement pension benefits but allowed them with respect to disability pension benefits. After district court rulings that the New Jersey statute invalidated the plans and was not superseded by ERISA, the Court of Appeals for the Third Circuit reversed, concluding that, since the purpose of the state statute was to impose an additional statutory requirement for pension plans, the statute was preempted by ERISA.

The Supreme Court, after plenary consideration, agreed with the appellate court that ERISA preempted the New Jersey statute. Recognizing that the preemption of state law by federal law is not likely to be inferred, 101 S. Ct. at 1905, the Court found that in ERISA § 514(a) Congress had expressly stated its intention to preempt the field of pension plan regulation:

> In this instance, we are assisted by an explicit congressional statement about the pre-emptive effect of its action. The same chapter of ERISA that defines the scope of federal protection of employee pension benefits provides that

> "the provisions of this Subchapter . . . shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under 1003(b) of this title." [§ 514(a)].
>
> This provision demonstrates that Congress intended to depart from its previous legislation that "envisioned the exercise of state regulation over pension funds," *Malone* v. *White Motor Corp.*, 435 U.S. 497, 512, 514 (1978) (plurality opinion), and meant to establish pension plan regulation as exclusively a federal concern.

Id. at 1906 (footnote omitted).

To determine the applicability of § 514(a) the Court had to decide whether the New Jersey statute, which did not purport to regulate pension plans *qua* pension plans, was a law that "relate[d] to any employee benefit plan." Having ruled in an earlier section of its opinion that ERISA, despite the silence of its terms and legislative history on the subject, permitted an employer to integrate pension benefits with workers' compensation benefits, *id.* at 1900-05, the Court found that the New Jersey statute did "relate" to such plans, even if its regulation was indirect rather than direct:

> Whatever the purpose or purposes of the New Jersey statute, we conclude that it "relate[s] to pension plans" governed by ERISA because it eliminates one method for calculating pension benefits—integration—that is permitted by federal law. . . .
>
> It is of no moment that New Jersey intrudes indirectly, through a workers' compensation law rather

> than directly, through a statute called "pension regulation." ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern. For the purposes of the pre-emption provision, ERISA defines the term State to include: "a State, or any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate, *directly or indirectly*, the terms and conditions of employee benefit plans covered by this title." 29 U.S.C. § 1144(c)(2) (emphasis added). ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the preemption provision.

Id. at 1907 (emphasis in original).

In addition, the Court rejected an argument that ERISA's preemption provision should not be applicable to the New Jersey statute in light of provisions exempting certain types of benefit plans from ERISA's coverage. Specifically, the plaintiff retirees argued that if the benefit plans in question had been maintained solely to comply with New Jersey's workers' compensation law, the plans would be exempt from ERISA's scope, §§ 4(b)(3), 514(a), 29 U.S.C. §§ 1003(b)(3), 1144(a) (1976), and that if plans maintained solely *to* comply with a certain law are not covered, that law should not be deemed preempted. The Court rejected this reasoning on the basis of the "plain language" of § 514(a), stating as follows:

> The only relevant state laws, or portions thereof, that survive this pre-emption provision are those relating to plans that are themselves exempted from ERISA's scope.

Id. at 1906 n.20.

The fact that *Alessi* dealt with pension benefit plans, rather than with disability benefit plans such as those at issue in *Minnesota* and the present case, is of no moment. Section 514(a) speaks in terms of "any employee benefit plan"; employee pension benefit plans and employee disability benefit plans are equally species of this genus. Thus preemption rules with regard to statutes that relate to pension benefit plans are equally applicable to statutes that relate to disability benefit plans. We summarize *Alessi*'s formulation of those rules as follows. ERISA § 514(a) states Congress's intention to establish employee benefit plan regulation as exclusively a federal concern. 101 S.Ct. at 1906. The only relevant state laws that survive this preemption provision are those relating to plans that are themselves exempt from ERISA's scope. *Id.* n.20. A state statute that eliminates from ERISA-covered employee benefit plans features that are permitted by federal law is preempted. *Id.* at 1907.

Although the *Alessi* Court did not purport to determine the outer limits of § 514(a)'s preemptive reach, these principles amply cover the *Minnesota* situation. The disability benefit plans at issue in *Minnesota* were covered by ERISA. Federal law permitted an employer to choose whether or not to provide pregnancy benefits in disability benefit plans. The *Minnesota* statute requiring an employer to provide pregnancy benefits as part of such plans "relate[d]" to ERISA-covered plans. And ERISA has preempted the regulatory field for plans within its scope. Had the principles stated in *Alessi* been applied to the *Minnesota* statute, the statute could not have been upheld.

We thus conclude that *Minnesota* has been overruled in principle by *Alessi*. Although we would naturally feel more confident of this conclusion had *Minnesota* been mentioned in the Court's opinion in *Alessi*, we regard the development of obviously applicable principles in *Alessi* as the sort of doctrinal development referred to in *Hicks* v. *Miranda*, *supra*, by which the Court instructs us that a prior summary decision is no longer controlling.

Effect of Alessi *on the HRL*

Our conclusion that the principles stated in *Alessi* are incompatible with the result in *Minnesota* answers the question of *Alessi*'s effect on our original holding, on the basis of the indistinguishable statute in *Minnesota*, that the HRL was not preempted by ERISA. As we discussed in that earlier opinion, during the time period relevant in the present case, federal law permitted employers to provide or exclude benefits for pregnancy-related disability as they pleased or as they might agree through collective bargaining. *See* 650 F.2d at 1291-92. By requiring employers to provide pregnancy benefits, the HRL applied directly to matters that federal law then reserved to private choice, and it eliminated one permissible method for allocating the cost of pregnancy-related disability. Thus, under the teaching of *Alessi*, the HRL "relate[d] to" ERISA-governed benefit plans within the meaning of ERISA § 514(a), and it was therefore preempted by that provision.

In reaching this conclusion we reject the suggestion of the Equal Employment Opportunity Commission as amicus

curiae that we should find *Minnesota* untouched by *Alessi* on the basis of the "double savings clause argument." As we noted in our original opinion, 650 F.2d at 1295 n.10, this argument focuses on ERISA § 514(d), 29 U.S.C. § 1144(d), which exempts other federal laws, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976) ("Title VII"), from supersedure by ERISA. Title VII, in turn, exempts state fair employment laws from preemption by Title VII. 42 U.S.C. § 2000e-7. The double savings clause argument urges that the net effect of these two provisions is to exempt state fair employment practice laws from preemption by ERISA. *See e.g., Westinghouse Electric Corp. v. Maryland Commission on Human Relations*, 520 F. Supp. 539 (D. Md. 1981). We rejected this argument in *Pervel Industries, Inc. v. Connecticut Commission on Human Rights & Opportunities*, 603 F.2d 214 (2d Cir. 1979), *aff'd* 468 F. Supp. 490 (D. Conn. 1978), *cert. denied*, 444 U.S. 1031 (1980), and we adhere to that rejection here. In granting summary judgment in favor of the employer in *Pervel*, then-District Judge Newman gave two sound reasons for rejecting the double savings clause argument. First, during the debates in the Senate on the Age Discrimination in Employment Act (ADEA) Amendments of 1978, there was an "explicit acknowledgment by Senate architects of ERISA" that neither ERISA nor a double savings clause interpretation of ERISA and ADEA preserved state age discrimination laws; Judge Newman concluded that these remarks supported the argument that ERISA preempted the state sex discrimination laws at issue in *Pervel*. 468

F. Supp. at 493 n.2. Second, although Title VII saves state discrimination laws from preemption, it does not transform those laws into federal laws, and only federal laws are protected from preemption by ERISA. *See id.* at 493. Therefore, ERISA § 514(a) provides no basis for holding that HRL § 296 has not been preempted.

Accordingly, we vacate our prior opinion insofar as it held, on the basis of *Minnesota*, that the HRL was not preempted during the relevant period,[2] and we affirm the judgment and order of the district court to the extent that it held that the HRL was unenforceable. Our remand to the district court with respect to other issues remains unchanged.

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2. We also vacate, as no longer necessary to our decision concerning the enforceability of the HRL, those portions of our prior opinion in which we held that the HRL was not preempted by either Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *to* 2000e-17 (1976), or by the Railway Labor Act, 45 U.S.C. §§ 151-188 (1976). *See* 650 F.2d at 1296-1301. The rationale of those discussions remains applicable, however, to the sections of our prior opinion that held that New York's Disability Benefits Law, N.Y. Work. Comp. Law § 205(3) (McKinney Supp. 1980-1981), insofar as it requires employers to provide certain minimum benefits for pregnancy-related disability, is not preempted by Title VII or the Railway Labor Act. *See* 650 F.2d at 1301-02.

Opinion on Rehearing, November 24, 1981 — Burroughs Corporation

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

On Rehearing

No. 17—September Term, 1980

(Originally Argued September 25, 1980

Decided May 11, 1981)

(Petition for rehearing filed June 9, 1981)

Decided November 24, 1981

Docket No. 80-7127

BURROUGHS CORPORATION,

Plaintiff-Appellee,

against

WERNER H. KRAMARSKY, *As Commissioner of the New York State* DIVISION OF HUMAN RIGHTS,

Defendant-Appellant.

Before:

MINER and KEARSE, *Circuit Judges,*
and TENNEY, *District Judge.**

On rehearing as to whether the panel's prior ruling that § 296 of the New York Human Rights Law ("HRL") was

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* Honorable Charles H. Tenney, Senior Judge of the United States District Court for the Southern District of New York, sitting by designation.

not preempted by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1144(a), should be reversed in light of the Supreme Court's decision in *Alessi v. Raybestos-Manhattan, Inc.*, 101 S. Ct. 1895 (1981), *held*: HRL § 296 is preempted by ERISA.

The judgment of the district court is affirmed in part and remanded in part.

ANN THACHER ANDERSON, General Counsel, State Division of Human Rights, New York, N.Y., *for Defendant-Appellant.*

WILLIAM E. MCKNIGHT, SHELBY D. GREEN, Nixon, Hargrave, Devans & Doyle, Rochester, N.Y., *for Plaintiff-Appellee.*

Per Curiam:

For the reasons stated today in our opinion on rehearing in *Delta Airlines, Inc. v. Kramarsky*, No. 80-7179, we vacate our original decision on this appeal, reported at 650 F.2d 1308, holding that § 514(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a)(1976), did not preempt New York's Human Rights Law, N.Y. Exec. Law § 296 (McKinney 1972 & Supp. 1980-1981).

The judgment of the district court enjoining enforcement of the Human Rights Law with respect to plaintiff's employee benefit plans is affirmed. For the reasons stated in our original opinion, plaintiff's claim under 42 U.S.C. § 1983 is remanded for such further consideration as may be appropriate.

Opinion on Rehearing, November 24, 1981 — Metropolitan Life Insurance Company

UNITED STATES COURT OF APPEALS

For the Second Circuit

On Rehearing

No. 19—September Term, 1980

(Originally argued September 25, 1980
Decided May 11, 1981)

(Petition for rehearing filed June 9, 1981)
Decided November 24, 1981

Docket No. 80-7185

METROPOLITAN LIFE INSURANCE COMPANY,

Plaintiff-Appellee,

against

WERNER H. KRAMARSKY, As Commissioner of the New York State Division of Human Rights, THE NEW YORK STATE DIVISION OF HUMAN RIGHTS, and the NEW YORK STATE HUMAN RIGHTS APPEAL BOARD,

Defendants-Appellants.

Before:

MESKILL and KEARSE, *Circuit Judges*, and TENNEY, *District Judge.**

On rehearing as to whether the panel's prior ruling that § 296 of the New York Human Rights Law ("HRL") was

* Honorable Charles H. Tenney, Senior Judge of the United States District Court for the Southern District of New York, sitting by designation.

not preempted by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1144(a), should be reversed in light of the Supreme Court's decision in *Alessi v. Raybestos-Manhattan, Inc.*, 101 S. Ct. 1895 (1981), *held:* HRL § 296 is preempted by ERISA.

The judgment of the district court is affirmed.

ANN THACHER ANDERSON, General Counsel, State Division of Human Rights, New York, N.Y., *for Defendants-Appellants.*

JEFFREY A. MISHKIN, JEFFREY D. FIELDS, Proskauer Rose Goetz & Mendelsohn, New York, N.Y., *for Plaintiff-Appellee.*

Per Curiam:

For the reasons stated today in our opinion on rehearing in *Delta Airlines, Inc. v. Kramarsky*, No. 80-7179, we vacate our original decision on this appeal, reported at 650 F.2d 1309, holding that § 514(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a) (1976), did not preempt New York's Human Rights Law, N.Y. Exec. Law § 296 (McKinney 1972 & Supp. 1980-1981).

The judgment of the district court is affirmed.

Order of Court of Appeals Granting Rehearing — Delta Air Lines, Inc.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of October one thousand nine hundred and eighty-one.

PRESENT:

HON. LEONARD P. MOORE
HON. AMALYA L. KEARSE,
Circuit Judges
HON. CHARLES H. TENNEY
District Judge

80-7179 80-7225

DELTA AIR LINES, INC., ALLEGHENY AIRLINES, INC., NATIONAL AIRLINES, INC., PIEDMONT AVIATION, INC., BRANIFF AIRWAYS, INC., NORTH CENTRAL AIRLINES, INC., SOUTHERN AIRWAYS, INC., EASTERN AIR LINES, INC., NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., OZARK AIR LINES, INC., AMERICAN AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., and UNITED AIR LINES, INC.,

Plaintiffs-Appellees Cross-Appellants

v.

WERNER H. KRAMARSKY, *et al.*,

Defendants

Order of Court of Appeals Granting Rehearing—Delta

WERNER H. KRAMARSKY, individually and in his capacity as Commissioner of the N.Y.S. Division of Human Rights, ANN THACHER ANDERSON, individually and in her capacity as General Counsel of the New York State Division of Human Rights, THE NEW YORK STATE DIVISION OF HUMAN RIGHTS, an agency of the Executive Department of the State of New York,

Defendants-Appellants
Cross-Appellees

ARTHUR COOPERMAN, individually and in his capacity as Chairman of the New York State Workers Compensation Board and the NEW YORK STATE WORKERS COMPENSATION BOARD,

Defendants-Appellees.

Petitions for rehearing having been filed herein by counsel for the plaintiffs-appellee-cross-appellants, Delta Air Lines, Inc. et al, and by counsel for the defendants-cross-appellees, Werner H. Kramarsky, et al,

Upon consideration thereof, it is

Ordered that said petitions be and they hereby are granted. The matter is resubmitted to the panel that heard the appeal.

/s/ A. DANIEL FUSARO
Clerk

By: /s/ FRANCIS X. GINDHART
Francis X. Gindhart
Chief Deputy Clerk

Order of Court of Appeals Granting Rehearing — Burroughs Corporation

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of October, one thousand nine hundred and eighty-one

Present:

HON. LEONARD P. MOORE
HON. AMALYA L. KEARSE,
Circuit Judges
HON. CHARLES H. TENNEY
District Judge

Docket No. 80-7127

BURROUGHS CORPORATION,

Plaintiff-Appellee,

v.

WERNER H. KRAMARSKY, as Commissioner of New York State Division of Human Rights,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the plaintiff-appellee, Burroughs Corporation,

Upon consideration thereof, it is

Order of Court of Appeals Granting Rehearing—Burroughs Corporation

Ordered that said petition be and it hereby is granted. The matter is resubmitted to the panel that heard the appeal.

A. DANIEL FUSARO, Clerk

By: /s/ FRANCIS X. GINDHART

FRANCIS X. GINDHART
Chief Deputy Clerk

Order of Court of Appeals Granting Rehearing — Metropolitan Life Insurance Company

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of October, one thousand nine hundred and eighty-one

Present:

HON. LEONARD P. MOORE
HON. AMALYA L. KEARSE,
Circuit Judges
HON. CHARLES H. TENNEY,
District Judge

80-7185

METROPOLITAN LIFE INSURANCE COMPANY,
Plaintiff-Appellee,

v.

WERNER H. KRAMARSKY, as Commissioner of the New York State Division of Human Rights, THE STATE DIVISION OF HUMAN RIGHTS and the NEW YORK STATE HUMAN RIGHTS APPEAL BOARD,

Defendants,

WERNER H. KRAMARSKY, as Commissioner of the New York State Division of Human Rights, and THE NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Defendants-Appellants.

Order of Court of Appeals Granting Rehearing—Metropolitan Life Insurance Company

A petition for a rehearing having been filed herein by counsel for the plaintiff-appellee, Metropolitan Life Insurance Co.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is granted. The matter is resubmitted to the panel that heard the appeal.

A. DANIEL FUSARO, Clerk

By: /s/ FRANCIS X. GINDHART
Francis X. Gindhart
Chief Deputy Clerk

Opinion of the Court of Appeals, May 11, 1981 — Delta Air Lines, Inc.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 18, 57 — September Term, 1980

Argued: September 25, 1980 — Decided: May 11, 1981

Docket Nos. 80-7179, 80-7225

DELTA AIR LINES, INC., ALLEGHENY AIRLINES, INC., NATIONAL AIRLINES, INC., PIEDMONT AVIATION, INC., BRANIFF AIRWAYS, INC., NORTH CENTRAL AIRLINES, INC., SOUTHERN AIRWAYS, INC., EASTERN AIR LINES, INC., NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., OZARK AIR LINES, INC., AMERICAN AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., and UNITED AIRLINES, INC.,

Plaintiffs-Appellees-Cross-Appellants,

v.

WERNER H. KRAMARSKY, Individually and in his capacity as Commissioner of the New York State Division of Human Rights; ANN THACHER ANDERSON, Individually and in her capacity as General Counsel of the New York State Division of Human Rights; THE NEW YORK STATE DIVISION OF HUMAN RIGHTS, an agency of the Executive Department of the State of New York; ARTHUR COOPERMAN, Individually and in his capacity as Chairman of the New York State Workmen's Compensation Board; and the NEW YORK STATE WORKMEN'S COMPENSATION BOARD,

Defendants-Appellants-Cross-Appellees.

Opinion of the Court of Appeals, Delta Air Lines, Inc.

Before: MOORE and KEARSE, *Circuit Judges*, and TENNEY, *District Judge.**

Appeal and cross- appeal from a judgment of the United States District Court for the Southern District of New York, Morris E. Lasker, *Judge*, enjoining enforcement of N.Y. Exec. Law § 296 and dismissing plaintiff's claims against enforcement of N.Y. Work. Comp. Law § 205(3).

Reversed in part, vacated in part and remanded.

J. STANLEY HAWKINS, Atlanta, Ga. (Dean Booth, Keith M. Wiener, Seward & Kissell, Atlanta, Ga., on the brief), *for Plaintiffs-Appellees-Cross-Appellants Delta Airlines, Inc., et al.*

ANN THACHER ANDERSON, General Counsel, State Division of Human Rights, New York, N.Y., *for Defendants-Appellants Werner H. Kramarsky, et. al.*

MYRNA M. MARTINEZ, Assistant Attorney General, New York, N.Y. (Robert Abrams, Attorney General of the State of New York, Shirley Adelson Siegel, Solicitor General, Peter Bienstock, Assistant Attorney General, Daniel Berger, Deputy Assistant Attorney General, New York, N.Y., on the brief), *for Defendants-Cross-Appellees Arthur Cooperman, et al.*

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* Honorable Charles H. Tenney, Senior Judge of the United States District Court for the Southern District of New York, sitting by designation.

CAROL MOSCHIANDREAS, Washington, D.C. (Leroy D. Clark, General Counsel, Joseph T. Eddins, Associate General Counsel, Lutz Alexander Prager, Washington, D.C., on the brief), *for Equal Employment Opportunity Commission as amicus curiae.*

KEARSE, *Circuit Judge*:

Defendants New York State Division of Human Rights, Werner Kramarsky, its Commissioner, and Ann Thacher Anderson, its General Counsel (collectively the "Commissioner"), appeal from so much of a judgment of the United States District Court for the Southern District of New York, Morris E. Lasker, *Judge*, 485 F. Supp. 300 (S.D.N.Y. 1980), as enjoined them from requiring plaintiffs to alter their employee benefit plans to conform with New York's Human Rights Law, N.Y. Exec. Law § 296 (McKinney 1972 & Supp. 1980-81) ("HRL"). Plaintiffs Delta Air Lines, Inc. *et al.* (the "airlines"), cross-appeal from so much of the judgment as dismissed their complaint seeking a similar injunction against enforcement by the New York State Workmen's Compensation Board and its Chairman, Arthur Cooperman (collectively the "Board"), of New York's Disability Benefits Law, N.Y. Work. Comp. Law § 205(3) (McKinney Supp. 1980-81) ("DBL"). For the reasons below we reverse the ruling as to the HRL, and vacate the ruling as to the DBL and remand for further proceedings.

I. Background

Section 296 of the HRL requires that employee benefit plans provide coverage for disability due to pregnancy on the same basis on which other disabling conditions are covered.[1] Section 205(3) of the DBL requires employers to provide at least eight weeks of coverage for pregnancy-related disability.[2] The plaintiff airlines maintain various

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1. The HRL provides in part as follows:

> 1. It shall be an unlawful discriminatory practice:
>
> (a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.
>
> (b) For an employment agency to discriminate against any individual because of age, race, creed, color, national origin, sex, or disability or marital status, in receiving, classifying, disposing or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or employers.
>
> (c) For a labor organization, because of the age, race, creed, color, national origin, sex, or disability or marital status of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer.

N.Y. Exec. Law § 296(1), as amended.

2. The DBL provides in part as follows:

> No employee shall be entitled to benefits under this article:
>
> . . .
>
> 3. notwithstanding any other provision of law, for a period of disability in excess of eight weeks caused by or arising in connection with a pregnancy except for a period of disability occurring as a result of a complication of such pregnancy, and the liability of the employer or the chairman as provided in this article shall the exclusive statutory remedy of an employee for disability caused by or arising in connection with a pregnancy . . . .

N.Y. Work. Comp. Law. § 205(3).

employee benefits plans, including sickness and accident disability plans, sick leave plans, and medical benefit plans, through which payments are made to their employees who suffer nonoccupational illnesses or injuries covered by the plans. During the periods relevant herein their plans did not provide complete coverage for disabilities or costs associated with pregnancies. Plaintiffs brought the present action seeking declaratory and injunctive relief against enforcement of the HRL and the DBL on the grounds that each is preempted by any of three federal statutes: (1) the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1381 (1976 & Supp. II 1977) ("ERISA"); (2) Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976) ("Title VII"), or (3) the Railway Labor Act, 45 U.S.C. §§ 151-188 (1976) ("RLA").[3]

A. *The Statutory Grid*

1. *Federal and State laws relating to discrimination*

Section 703(a)(1) of Title VII, enacted in 1964 as part of the Civil Rights Act, makes it unlawful for an employer to discriminate against an employee "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1). As originally enacted, Title VII did not specify whether or not denial of employee benefits related to pregnancy was intended to constitute discrimination because of sex. In 1976, the Supreme Court

3. This is one of three unconsolidated cases argued together on appeal. Also argued were *Burroughs Corporation* v. *Kramarsky*, No. 80-7127, and *Metropolitan Life Insurance Company* v. *Kramarsky*, No. 80-7185, decided today in separate opinions. The plaintiffs in *Burroughs* and *Metropolitan* contended only that their employee benefit plans were not subject to the HRL on grounds of ERISA preemption. No other federal law was invoked, and no other New York law was challenged.

held that an employers' exclusion of pregnancy-related benefits from coverage under disability benefit plans did not constitute discrimination "because of . . . sex" within the meaning of § 703(a)(1). *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976).[4]

Like Title VII, New York's HRL prohibits discrimination in employment "because of . . . sex." Unlike the United States Supreme Court, however, the New York Court of Appeals interpreted this language in its own statute to require private employers maintaining disability benefits plans to provide benefits for pregnancy on the same basis as for other covered disabilities. *Brooklyn Union Gas Co.* v. *New York State Human Rights Appeal Board*, 41 N.Y. 2d 84 (1976).[5] Soon afterward, New York amended the DBL to require employers to provide coverage for at least eight weeks of pregnancy-related disability.[6]

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4. Earlier, with respect to state-sponsored plans, the Supreme Court had held, in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), that the denial of benefits for pregnancy-related disability did not invidiously discriminate against women in violation of the Equal Protection Clause of the Fourteenth Amendment.

5. The Court of Appeals had earlier interpreted the HRL to require pregnancy coverage in disability plans maintained by public employers, who were not subject to provisions of the DBL that formerly excepted pregnancy from among the conditions required to be covered under New York's disability insurance laws. *See, e.g., Union Free School Dist. No. 6* v. *New York State Human Rights Appeal Board*, 35 N.Y.2d 371 (1974). *Brooklyn Union Gas Co.* resolved the apparent conflict between the HRL and the DBL, both of which applied to private employers.

6. The effect of the amendment was to transfer jurisdiction of claims concerning pregnancy benefits from the state's Human Rights Division to its Workmen's Compensation Board. Counsel for the Commissioner informed the district court that the Board requires employers to treat pregnancy on a nondiscriminatory basis, so that employers who provide coverage beyond the DBL's eight week minimum for nonpregnancy-related disabilities must provide equal coverage for those that are pregnancy-related.

As of April 29, 1979, Title VII was amended to provide that the term "because of sex" would include the meaning "because of or on the basis of pregnancy, childbirth, or related medical condition." Pub. L. 95-555, 92 Stat. 2076 (1978). The amendment further provided that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs as other persons not so affected but similar in their ability or inability to work. . . ." 24 U.S.C. § 2000e(k) (Supp. II 1978). Thus, after April 29, 1979, the HRL was no longer broader than Title VII.

2. *Federal law relating to employee benefit plans*

In 1974, Congress enacted ERISA, a comprehensive federal statutory program designed to curb a variety of abuses associated with pension and other employee benefits plans, *see* 29 U.S.C. § 1001 (statement of congressional purpose). To protect the integrity of the federal regulatory scheme, ERISA § 514(a), 29 U.S.C. § 1144(a), provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in [ERISA § 4(a), 29 U.S.C. § 1003(a)] and not exempt under [ERISA § 4(b), 29 U.S.C. § 10003(b)]."[7] Section 4(a) of ERISA extends ERISA

7. Section 514 provides in part:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section [4(a)] of this title and not exempt under section [4(b)] of this title. This section shall take effect on January 1, 1975.

(footnote continued on next page)

coverage to "any employee benefit plan" maintained by an employer or union that affects interstate commerce. Section 4(b)(3) exempts from ERISA, *inter alia*, benefit plans

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(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section [4(a)] of this title, which is not exempt under section [4(b)] of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

. . . .

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law.

29 U.S.C. § 1144 (1976).

"maintained solely for the purpose of complying with applicable . . . disability insurance laws."[8]

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8. Sections 4(a) and (b) provide in pertinent part as follows:

> (a) Except as provided in subsection (b) of this section . . . , this subchapter shall apply to any employee benefit plan if it is established or maintained—
>
> (1) by any employer engaged in commerce or in any industry or activity affecting commerce; or
>
> (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or
>
> (3) by both.
>
> (b) The provisions of this subchapter shall not apply to any employee benefit plan if—
>
> (1) such plan is a governmental plan (as defined in section 1002(32) of this title);
>
> (2) such plan is a church plan (as defined in section 1002(33) of this title) with respect to which no election has been made under section 410(d) of Title 26;
>
> (3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;
>
> (4) such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are non-resident aliens; or
>
> (5) such plan is an excess benefit plan (as defined in section 1002(36) of this title) and is unfunded.

29 U.S.C. § 1003(a), (b) (1976).

The term "employee benefit plan" is defined in ERISA to include an "employee welfare benefit plan." 29 U.S.C. § 1002(3). This latter term, in turn, means:

> any plan, fund, or program which was heretofor or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, ...

3. *Federal law relating to employer-employee relations*

The RLA, enacted in 1926, regulates labor relations of interstate rail carriers, and is made applicable to air carriers by 45 U.S.C. § 181. The RLA is designed to promote the collective bargaining process, and generally permits the parties to collective bargaining to agree upon whatever terms are mutually satisfactory.

B. *The Airlines' Contentions*

Plaintiffs contend that from December 20, 1976, when the HRL was first interpreted more broadly than Title VII, until April 29, 1979, when Title VII became as broad as the HRL, the HRL could not lawfully be applied to their employee benefit plans. Their principal contention is that because the HRL "relate[s] to" employee benefits plans within the meaning of ERISA § 514(a), that statute preempted the HRL during the above period, and thus relieved plaintiffs of any obligation to comply with it. In addition they argue that the RLA supersedes the HRL under general principles of federal labor law preemption, and that the inclusion of pregnancy benefits in its disability plan pursuant to the HRL during that period would have constituted sex discrimination against male employees in violation of Title VII.[9]

Plaintiffs similarly contend that the DBL is preempted or superseded by ERISA, RLA and Title VII, but their challenge is not limited to the same period. Because the

9. Once the 1978 amendments to Title VII became effective on April 29, 1979, plaintiffs modified their disability benefits plans to comply with Title VII as amended, and they apparently do not question the validity of the HRL after that date.

DBL imposes a specific minimum level of benefits for disability due to pregnancy (whereas the HRL requires only that pregnancy be treated the same as other disabilities), the DBL's command is not congruent with that of Title VII. Accordingly, plaintiffs argue that the DBL amendment was invalid from its effective date, August 3, 1977, to the present.

C. *The District Court's Decision*

The district court entered summary judgment in favor of plaintiffs on their claim that the HRL was preempted by ERISA, and enjoined enforcement of the HRL with respect to their employee benefit plans. In so ruling, the court relied on *Pervel Industries, Inc.* v. *Connecticut Comm'n on Human Rights & Opportunities*, 468 F. Supp. 490 (D. Conn. 1978), *aff'd mem.*, 603 F.2d 214 (2d Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980), in which this Court affirmed by summary order a ruling of then-District Judge Newman that ERISA § 514(a) preempted a Connecticut statute that is quite similar to the HRL. The court found it unnecessary to pass on the airlines' RLA and Title VII arguments concerning the HRL.

As to the DBL, the court rejected all of plaintiffs' arguments and granted the Board's motion to dismiss the complaint for failure to state a claim upon which relief could be granted. The court found that any provision of a benefit plan maintained in compliance with the DBL would be exempted from ERISA coverage by virtue of ERISA § 4(b)(3), 29 U.S.C. § 1003(b)(3), so that the preemption provisions of § 514(a) were inapplicable to the DBL. As

to the RLA, the court held that the DBL regulated activity in which there was a "deeply rooted" local interest and therefore fell within an exception to the general rule that federal labor laws preempt state laws impinging on the collective bargaining process. Finally, relying on *General Electric Co.* v. *Gilbert, supra,* and *City of Los Angeles Department of Water & Power* v. *Manhart,* 435 U.S. 702 (1978), the court held that the DBL did not conflict with, and thus was not preempted by, federal antidiscrimination laws.

The Commissioner appeals from the district court's order invalidating the HRL; the airlines cross-appeal from the order upholding the DBL

II. Enforceability of the HRL

We consider first plaintiffs' claims that federal law forbade enforcement of the HRL. For the reasons below, we conclude that the HRL was not preempted by ERISA, or Title VII, or the RLA.

A. *HRL and ERISA*

We turn first to the question of the validity of the HRL under § 514(a) of ERISA. Although at first glance our summary affirmance in the *Pervel* case, discussed above, would seem to require us to find the HRL invalid, equally summary action from another quarter compels a different result.

After the decision below was rendered, the United States Supreme Court dismissed, for want of a substantial

federal question, appeals from decisions of two state courts, each holding that ERISA § 514(a) does not preempt state laws similar to the HRL. *Minnesota Mining & Manufacturing Co.* v. *Minnesota*, 444 U.S. 1041 (1980), *dismissing appeal from* 289 N.W.2d 396 (Minn. 1979) (hereinafter "*Minnesota*"); *Mountain State Telephone & Telegraph Co.* v. *Commissioner of Labor & Industry*, 445 U.S. 921 (1980), *dismissing appeal from* 608 P.2d 1047 (Mont. 1979) (hereinafter "*Mountain States*"). The Commissioner here contends that *Minnesota* and *Mountain States* require us to held that ERISA does not preempt the HRL, despite our contrary holding, relied on below, with respect to a comparable Connecticut statute in *Pervel, supra*. We agree.

It is well-established that Supreme Court summary affirmances and dismissals for want of a substantial federal question are judgments on the merits that bind lower courts with respect to the "precise issues presented [to the Supreme Court] and necessarily decided" by it in disposing of the appeal. *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977) (per curiam). *See also Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 182-83 (1979); *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 477-78 n.20 (1979); *Hicks* v. *Miranda*, 422 U.S. 332 (1975). In attempting to apply the rule resulting from such a summary decision, however, lower courts must undertake a careful analysis of the precise "reach and content" of the Supreme Court's action. *Mandel* v. *Bradley, supra*, 432 U.S. at 176 (quoting

Hicks v. *Miranda, supra*, 422 U.S. at 345 n.14). Such summary dispositions affirm only the judgment of the court below and do not necessarily adopt its reasoning. *Illinois State Board of Elections* v. *Socialist Workers Party, supra; Mandel* v. *Bradley, supra*. Thus, a court seeking to apply such a precedent must carefully examine the appellant's jurisdictional statement in order to determine which questions the Supreme Court necessarily decided. *Washington* v. *Yakima Indian Nation, supra; Mandel* v. *Bradley, supra; Hicks* v. *Miranda, supra*. Applying this analysis to the dismissal in the *Minnesota* case, we conclude that it compels a holding that ERISA does not preempt the HRL.

In *Minnesota*, an employee who had been denied benefits for pregnancy-related disability sued her employer under a state law that explicitly required employers to treat pregnancy the same as other disabling conditions for purposes of disability benefits plans. The state court held that the employers' disability program violated state law, and further held the ERISA § 514(a) did not preempt the state statute. 289 N.W.2d 396.[10] In its jurisdictional

10. In *Minnesota*, the Minnesota Supreme Court relied on what has become known as the "double savings clause argument" in holding that ERISA did not preempt the state's fair employment practices law. ERISA § 514(d), 29 U.S.C. § 1144(d), exempts other federal laws, including Title VII, from supersedure by ERISA. Title VII, in turn, exempts state fair employment practice laws from preemption by Title VII. 42 U.S.C. § 2000e-7. The double savings clause argument holds that the net effect of these two provisions is to exempt such state laws from preemption by ERISA. *See Minnesota, supra; Mountain States, supra*. In affirming on the basis of the district court's opinion in *Pervel, supra*, we rejected this statutory argument. *See* 468 F. Supp. at 493. We reiterate that rejection here, as we are free to do since the Supreme Court's summary affirmance in *Minnesota* did not adopt the state court's reasoning in that case, *see Mandel* v. *Bradley, supra*, 432 U.S. at 176.

statement on appeal to the Supreme Court, the employer framed the question presented as whether ERISA "preempts Minnesota's effort, by means of its fair employment practice statute, to dictate the contents of [the employer's] national employee benefit plan." The jurisdictional statement as a whole presented arguments, substantially similar to those presented by the plaintiffs here, to the effect that § 514(a) preempted the Minnesota law.

We can see no sound reason to decline to follow *Minnesota* here. The state statute at issue in that case is virtually identical to the HRL.[11] Moreover, the ERISA preemption issue was squarely presented to the Supreme Court in the appeal papers, and the appeal was plainly within the Supreme Court's obligatory appellate jurisdiction under 28 U.S.C. § 1257(2) (1976). We can discern no possible basis for the *Minnesota* dismissal other than a holding that ERISA does not preempt a state law requiring that disability benefits plans treat pregnancy the same as other disabling conditions. Therefore, *Minnesota* requires us to uphold the HRL against the ERISA challenge mounted here.

The plaintiffs' arguments for a contrary course are unpersuasive. For the most part, plaintiffs reiterate the Supreme Court's cautionary remarks about the danger of reading summary decisions too broadly, citing, *e.g.*, *Illinois State Bd. of Elections* v. *Socialist Workers Party, supra,*

11. It is immaterial that the Minnesota statute explicitly prohibited the denial of pregnancy benefits while the HRL took on this meaning only through judicial interpretation. The net effect of the statutes is exactly the same, and ERISA § 514(c), 29 U.S.C. § 1144 (c), defines the state laws subject to preemption as including court decisions.

440 U.S. at 183. While we have recognized this danger in our own decisions, *see, e.g., New York Telephone Co.* v. *New York State Dep't of Labor*, 566 F.2d 388, 391 n.2 (2d Cir. 1977), *aff'd*, 440 U.S. 519 (1979); *In re Letourneau*, 559 F.2d 892, 893 n.4 (2d Cir. 1977), our analysis has satisfied us that the issue presented in the instant case is virtually identical to that decided in *Minnesota*. Moreover, while it is true, as plaintiffs note, that summary actions carry less precedential weight in the Supreme Court than do decisions rendered with opinion after agrument, *see, e.g., Washington* v. *Yakima Indian Nation, supra*, 439 U.S. at 476-77 n.20; *Edelman* v. *Jordan*, 415 U.S. 651, 670-71 (1974), it is also true that "the privilege of disregarding even summary Supreme Court holdings rests with that court alone," and not with us. *Doe* v. *Hodgson*, 500 F.2d 1206, 1207-08 (2d Cir. 1974).

Plaintiffs also argue that the timing of the *Minnesota* dismissal weakens its precedential force. The Supreme Court dismissed the appeal in *Minnesota* exactly one week after it had denied certiorari in both *Pervel, supra*, in which we summarily struck down under ERISA a Connecticut pregnancy benefits law, and *Bucyrus-Erie Co.* v. *Department of Industry, Labor & Human Relations*, 599 F.d 205 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980), in which the Seventh Circuit, taking the opposite view, rejected an ERISA-based challenge to a similar Wisconsin statute. Because the Court let stand these divergent circuit court rulings at a time when it could easily have remanded them for further consideration in light of the forthcoming affirmance in *Minnesota*, plaintiffs conclude

that the Justices did not intend "to create a unified body of precedent on the ERISA preemption issue," Brief on Appeal at 14, and that *Pervel* therefore retains its vitality in this Circuit, *Minnesota* notwithstanding.

We reject this contention. Like the plaintiffs, we find the sequence of events described above rather mystifying. Nonetheless, it remains the law that dismissals of appeals are binding precedents, while denials of certiorari have no precedential force. *Compare Hicks* v. *Miranda*, *supra*, *with Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912 (1950) (opinion of Frankfurter, J., with respect to denial of certiorari). *See generally* R. Stern & E. Gressman, Supreme Court Practice §§ 4.31, 5.7 (5th ed. 1978); Linzer, *The Meaning of Certiorari Denials*, 79 Colum. L. Rev. 1227 (1979). Although courts have sometimes disregarded the latter rule on the ground that special circumstances surrounding a particular denial of certiorari revealed the Justices' view of the merits, *see* Linzer, *supra*, at 1277-91, we see no reason for such an undertaking here, where the denials have tended more to obscure than to illuminate the Court's position.

Accordingly, we hold that the HRL was not preempted by ERISA.

B. *HRL and Title VII*

We turn next to the airlines' contention that Title VII[12] preempted the HRL during the periods at issue here. Title VII forbids employers to "discriminate" against

12. The airlines also sued under the Equal Pay Act, 29 U.S.C. § 206(d), and under Executive Order No. 11246. The operative principles of these provisions are identical to those of Title VII and we do not consider them separately.

their employees "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1), (2). Generally speaking, the statute prohibits not only those employment practices designed to discriminate on proscribed grounds, but also those facially neutral practices that have the effect of discriminating on such grounds.[13] *See generally Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Plaintiffs argue that by compelling employers to provide disability benefits for their pregnant employees, all of whom are necessarily female, the HRL mandated discrimination against *male* employees "because of . . . [their] sex," in violation of Title VII. If the HRL mandated discrimination that was unlawful under Title VII during the relevant time period, then, of course, it was invalid under the Supremacy Clause.[14] We hold, however, that the HRL was entirely lawful under Title VII.[15]

In contending that the HRL contravened Title VII, the airlines rely primarily on *General Electric Co.* v. *Gilbert*, *supra*, in which the Supreme Court held that the exclusion of pregnancy from coverage under a disability plan did not discriminate against women in violation of Title VII. In reaching this conclusion, the Court observed

13. Title VII insulates an employer from liability if he can show that a neutral practice having a discriminatory effect is justified by business necessity. *See, e.g., Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1977); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). No party has contended that this exception applies in the present appeal.

14. Section 708 of Title VII, 42 U.S.C. § 2000e-7, provides that Title VII does not preempt any state law "other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice" under Title VII.

15. Because these issues are purely legal and have been extensively briefed by the parties, we proceed to resolve them here, without need for a remand.

that the "package" of fringe benefits provided under the employer's plan was "facially nondiscriminatory in the sense that '[t]here is no risk from which men are protected and women are not.' " 429 U.S. at 138, quoting *Geduldig* v. *Aiello*, 417 U.S. 484, 496-97 (1974) (*see* note 4 *supra*). In addition, the Court noted that the plan did not have a discriminatory effect upon the women:

> As there is no proof that the package [of insurance benefits] is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability-benefits plan is less than all-inclusive. . . . [P]regnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks.

429 U.S. at 138-39 (emphasis in original).

From the quoted language, the airlines derive their two principal arguments. First, they argue that the pre-1979 inclusion of pregnancy as a covered condition under their disability plans would have been unlawful under Title VII because it would have destroyed the plans' "facially evenhanded inclusion of risks." Second, they contend that the provision of pregnancy benefits would render the "package" of benefits under a plan more valuable to women than to men, so that the plan would have the unlawful effect of discriminating against men in their compensation because of their sex.

The airlines' first argument is easily disposed of. That *Gilbert* held the exclusion of pregnancy benefits to be non-discriminatory does not compel the conclusion that the inclusion of such benefits is necessarily discriminatory. The *Gilbert* Court itself, quoting *Geduldig* v. *Aiello*, *supra*, 417 U.S. at 496-97 n.20, explicitly observed that classifications based on pregnancy are not facially discriminatory:

> Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes.

429 U.S. at 134-35. Therefore, the inclusion of pregnancy benefits is no more "discriminatory per se" than was their exclusion.

To evaluate plaintiffs' second argument, that a disability plan complying with the HRL has a discriminatory effect upon men, we must review the allegations of the complaint. The airlines alleged, and we must therefore accept as true for these purposes, that the disability benefits provided their male and female employees during the relevant period were "fairly equivalent in value in terms of dollar

benefits paid per salary dollar," and that their employees were "covered equally under the [disability] plans," regardless of sex, for all disabilities unrelated to pregnancy. They alleged further that the provision of pregnancy benefits pursuant to the HRL would have increased the value of the disability "package" to women without providing a corresponding increase to men. Therefore, plaintiffs conclude, the New York statutes had the unlawful effect of mandating discrimination against men on the basis of their sex.

This argument is unfounded. Although we must accept plaintiffs' factual allegations as true, we need not assume the truth of conclusions of law or unwarranted factual inferences that they have pleaded. *See generally* 2A Moore's Federal Practice ¶ 12.08, at 2266-69 (2d ed. 1980). The airlines' characterization of the "value" of disability benefits to their employees falls into the latter category. The "value" of a disability plan as an item of compensation for an individual worker is not the amount of benefits payable to that worker in the event of disability. Rather, it is the worker's pro rata share of the total cost of providing disability coverage, which in turn equals the sum of the plan's total payout and expenses.[16] Plaintiffs have not alleged that the HRL would require male employees

16. The benefits payable in the future have no present value, being a mere expectancy, contingent upon the occurrence of an insured risk. Therefore, in a plan where the employer bears the full cost of providing benefits, the value of the plan is equal to the cost to the worker of purchasing equivalent coverage directly from an insurer. To the extent that the employee pays for some or all of the cost of insurance, the value of the plan is the difference between the lower cost of purchasing group insurance and that of purchasing individual coverage.

to pay greater individual pro rata shares of the total cost of coverage. The increase in total cost occasioned by the inclusion of pregnancy benefits, and the corresponding increase in the plan's value as an item of compensation, is uniformly spread among all employees. Because this increase is uniform for all, it can hardly be said to have a discriminatory effect upon men. *Cf. City of Los Angeles Dep't of Water & Power* v. *Manhart*, *supra*.

Similarly, we reject the airlines' contention that a plan complying with the HRL has a discriminatory effect upon men because they will never receive the pregnancy benefits for which they have paid. Large numbers of women will be equally empty-handed. Under the HRL, all workers bear the cost of payments to the comparatively few who become disabled through pregnancy. The cost of these benefits does not depend upon the number of women in the employer's labor force, but upon the number of women who become pregnant. The latter variable is not a function solely of their sex, as the airlines would have it, but as well of age and marital status.[17] In short, the HRL did not require employers to discriminate against men on basis of their sex and was therefore not unlawful under Title VII.

17. Contrary to the airlines' contention, our disposition of the Title VII claims does not dispense with disparate impact analysis in employment discrimination litigation. We recognize that the Supreme Court's decisions in *Gilbert* and *Manhart*, *supra*, are somewhat difficult to reconcile in their application of disparate impact analysis to insurance schemes. Nonetheless, that analysis plainly remains valid in employment discrimination cases. We reject the airlines' argument because it improperly defines the group that feels the impact of the New York statutes.

C. HRL and the RLA

Finally, we consider the airlines' contention that the HRL was preempted by the RLA.[18] The RLA governs the collective bargaining agreements between the airlines and their employees pursuant to which the disability plans at issue here were established. Plaintiffs argue that by mandating pregnancy coverage not otherwise available under its collective bargaining agreements, the HRL unlawfully alters the terms of those agreements and impermissibly interferes with the collective bargaining processes established by the RLA. We disagree.[19]

In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), the Supreme Court set forth the basic framework of analysis for questions of federal labor law preemption. First, "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate" are either protected or proscribed by federal law, then "due regard for the federal enactment requires that state jurisdiction must yield." *Id.* at 244. Second, even if a state law touches upon conduct arguably governed by the federal scheme, the state may nevertheless regulate that conduct, if it is "a merely peripheral concern" of the fed-

18. We reject the argument that the Supreme Court's dismissal of the appeal in *Mountain States*, *supra*, is dispositive of the RLA preemption issue. The labor law preemption claim in *Mountain States* was based upon the Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.*, not upon the RLA. *Mountain States* therefore does not govern this case, *cf. Mandel* v. *Bradley*, *supra*, and we are free to examine the question in depth.

19. As with the airlines' Title VII preemption arguments, we believe that the issues raised respecting the RLA are purely legal, and we resolve them here.

eral law, or if it involves "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the court] could not infer that Congress had deprived the States of the power to act." *Id.* at at 243-44 (footnote omitted). Courts must carefully examine both the state interest in regulating the conduct at issue and the potential for interference with the federal regime. *Farmer* v. *United Brotherhood of Carpenters, Local 25*, 430 U.S. 290, 297, 300-01 (1977). Ultimately, however, the question is one of congressional intent. *Garmon, supra*, at 239-40.

At the outset, the airlines raise a contention that would divert us from this task of statutory analysis. Relying upon *Railway Employees' Dep't* v. *Hanson*, 351 U.S. 225 (1956), and *California* v. *Taylor*, 353 U.S. 553 (1957), they argue that the terms of their collective bargaining agreements, by themselves, override the HRL. Quoting *Hanson*, plaintiffs assert:

> A union agreement made pursuant to the Railway Labor Act has . . . the imprimatur of the federal law upon it and, by force of the Supremacy Clause of Article VI of the Constitution, could not be made illegal nor vitiated by any provision of the laws of a State.

351 U.S. at 232. *See also Taylor, supra*, 353 U.S. at 561 (RLA collective bargaining agreement "would take precedence over conflicting provisions" of state law). Because the airlines' collective bargaining agreements were negotiated pursuant to the RLA, they contend that the agreements themselves supersede state law, so that New York was powerless to require the insertion, through the

HRL, of terms concerning disability benefits that the parties themselves had omitted.

Hanson and *Taylor* do not stand for so sweeping a proposition. *Hanson* involved the application of a state "right to work" law, which forbade agreements requiring employees to join a union, to a collective bargaining agreement that contained an express "union shop" clause requiring union membership. The RLA expressly permitted unions to negotiate such union shop agreements "[n]otwithstanding any . . . statute or law . . . of any State." 45 U.S.C. § 152 (Eleventh). The essential point was that the state law conflicted with the terms of the RLA itself, not merely with an agreement negotiated under the RLA. *Taylor* involved an attempt by state authorities to subject employees of a state-owned railroad to the state civil service law, which forbade collective bargaining, despite the fact that the employees were then covered by a collective bargaining agreement negotiated with the state pursuant to the RLA. The Court held that the RLA applied to the state as employer, and that its conflicting civil service laws were therefore preempted. 353 U.S. at 561-68. As the *Taylor* Court's discussion of *Hanson* makes plain, the existing collective bargaining agreement would "take precedence over" the state civil service laws because those laws were invalid, as applied to the railroad, under the RLA itself. *Id.* at 560-61. We must therefore determine the validity of the New York statute by ascertaining the intent of Congress, not merely by perusing the airlines' agreements with their workers.

Nothing in the RLA clearly addresses the permissibility of state regulation such as the HRL. Among other things,

the RLA places upon employers a duty to bargain, empowers employees to organize and select representatives, establishes administrative bodies for the resolution of disputes, and prescribes certain rules concerning union security agreements, dues check-offs, and the like. 45 U.S.C. §§ 152, 153, 154. With very few exceptions, it permits parties to collective bargaining to adopt whatever terms are mutually satisfactory. We must therefore scrutinize the New York statutes in terms of their potential for interfering with the federal scheme and the strength of the state interests they reflect. *See, e.g., Garmon, supra; Farmer, supra.*

The RLA protects and vigorously promotes the collective bargaining process. *See, e.g., Taylor, supra,* 353 U.S. at 559, and cases cited. Thus, the airlines' most telling argument against the HRL is that it impermissibly curbs the parties' freedom to bargain over fringe benefits, a concededly valuable item of compensation. As the airlines note, "[t]he inclusion or noninclusion of a substantial economic benefit in a collectively bargained compensation package goes to the heart of the bargaining process." (Brief on Appeal at 38). Moreover, it is generally true that state laws designed to alter the terms of a collective bargaining agreement, *see Lodge 76, Int'l Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n,* 427 U.S. 132, 153 (1976), or to adjust the economic relations of parties to collective bargaining, *see Local 24, International Brotherhood of Teamsters* v. *Oliver,* 358 U.S. 283, 297 (1959), are inconsistent with federal policies protecting

the bargaining process. At first glance, therefore, the HRL does seem to intrude impermissibly upon an area that Congress has reserved for private negotiation.

Nonetheless, closer inspection of the complex of state and federal interests at stake persuades us that the HRL is fully valid under the RLA. First, it is consistent with prevailing federal policies concerning employment relations. The RLA, like other federal labor statutes, does not address the problem of employment discrimination. *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines, Inc.*, 372 U.S. 714 (1963). *See also Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII remedies operate independently of arbitration process established under collective bargaining agreement). Thus the fact that state antidiscrimination laws have some effect on collective bargaining under the RLA does not automatically invalidate them. We must look to other federal laws that govern employment discrimination in order to gauge their harmony with the overall federal scheme. *Cf. Malone* v. *White Motor Corp.*, 435 U.S. 497, 504-05 (1978) (federal pension legislation provides "far more reliable" guide to legislative intent than does the National Labor Relations Act in determining validity of state statute affecting pension plan established by collective bargaining). Title VII, the principal federal employment discrimination law, indicates that the HRL is and was in accordance with the federal scheme. Although the practices prohibited by the state statutes were not prohibited by Title VII prior to its amendment in 1978, *see General Electric Co.* v. *Gilbert, supra*. Title VII permits the states to adopt antidiscrimination measures more stringent than its own, *see* 42 U.S.C.

§ 2000e-7, and vigorous enforcement of state fair employment laws by state agencies is an integral part of the federal scheme, *see* 42 U.S.C. § 2000e-5(b), (c), (d), (e). The HRL is precisely the sort of state law that Congress had in mind. It provides protections beyond the federal minimum and establishes orderly administrative procedures for enforcing those protections. Thus, far from offending the principal federal regime in point, the HRL actually promoted it.

Furthermore, the statute reflects strong state interests and policies. As Title VII itself recognizes, the states have an abiding interest in eradicating employment discrimination. Title VII permits the states to act not only against forms of discrimination that have afflicted the nation as a whole, but also against those that are peculiarly local in character or peculiarly harmful in their local effects. New York has decided that the denial of certain minimum benefits for workers disabled by pregnancy contravenes its own policy of sheltering women from the economic dislocations otherwise attendant upon childbirth. *Brooklyn Union Gas Co., supra; Union Free School District No. 6* v. *New York State Human Rights Appeal Board*, 35 N.Y.2d 371 (1974). Nothing in that choice offends the RLA.

Accordingly, we hold that the HRL was not preempted by the RLA.

III. Enforceability of the DBL

We turn finally to the question whether federal law forbids enforcement of the DBL with respect to the airlines' employee benefit plans. While we agree with the district

court's view that neither Title VII nor the RLA preempts the DBL, we are constrained to conclude that the DBL may well be preempted by ERISA.

A. *DBL and Title VII*

In rejecting the airlines' contention that the DBL is preempted by Title VII, the district court took the view that the DBL does not create a sex-based classification by mandating minimum benefits for pregnancy-related disability, and that it does not have the prohibited effect of compelling employers to compensate employees at different rates on the basis of their sex. 485 F. Supp. at 309-11. We agree. Plaintiffs' contentions with regard to the DBL are substantively identical to their arguments with regard to the HRL,[20] and our discussion in Part II.B. above as to why Title VII did not preempt the HRL applies with equal force to the DBL.

B. *DBL and the RLA*

In rejecting the airlines' contention that the DBL is preempted by the RLA, the district court reasoned that the DBL reflects a state interest in eliminating sex discrimination that is "so deeply rooted in local feeling and responsibility" that Congress could not have intended to preempt it. 485 F. Supp. at 308-09.

Although we agree with the airlines that the DBL is not necessarily a law of the sort "so deeply rooted in local feel-

20. The fact that the DBL mandates specific minimum benefits while the HRL theoretically does not has no significance in this analysis. New York could permissibly conclude that minimum benefits are necessary to protect women from discrimination.

ing and responsibility" as to fall within the second exception of *San Diego Building Trades Council* v. *Garmon*, *supra; cf. Lodge 76, supra*, 427 U.S. at 137 n.2 ("local interest" exception predicated on state's power over "such traditionally local matters as public safety and order and the use of streets and highways"), our agreement does not mean that plaintiffs' RLA contention should be upheld. The local interest exception applies only when the disputed state law governs conduct that comes within the ambit of federal labor law. For the reasons we have discussed in Part II.C. above with respect to the HRL, we conclude that the DBL governs matters outside the intended reach of the RLA and that the RLA therefore does not preempt the DBL.

C. The DBL and ERISA

We turn finally to the question whether the DBL is preempted by ERISA. We do not consider this issue to be foreclosed in the Board's favor by our holding above concerning the validity of the HRL under ERISA. Unlike the HRL and the state statutes upheld against ERISA preemption in *Minnesota* and *Mountain States, supra*, the DBL does not merely forbid employers to discriminate against workers disabled through pregnancy, but instead affirmatively requires employers to provide minimum pregnancy benefits. Because the DBL thus differs from the "pure" antidiscrimination laws upheld in *Minnesota* and *Mountain States*, those decisions are not controlling with respect to it, and we must make an independent review of its validity. *Cf. Mandel* v. *Bradley, supra*, 432 U.S. at 176.

Nor is the issue of ERISA preemption foreclosed by our analysis of the validity of the HRL and DBL under the RLA. It is true that ERISA does not address problems of sex discrimination any more than does the RLA, so that the analysis of state and federal interests presented with respect to the RLA would apply with equal force to ERISA, absent any other indications of congressional intent. Unlike any provision of the RLA, however, ERISA § 514(a) explicitly addresses the preemption question. Thus, in considering that question, we cannot rely solely upon the general policy considerations which lead us to uphold the HRL and DBL under the RLA. Instead, we must seek to divine the intent of Congress as expressed in § 514(a).

The airlines' principal contention is that insofar as the DBL requires employers to provide minimum benefits for pregnancy-related disabilities, it "relate[s] to" employee benefit plans within the meaning of § 514(a) of ERISA and is therefore invalid.[21] The Board's principal response is that the DBL does not "relate to" such plans in the manner Congress contemplated, so that § 514(a) is inapplicable to it. The district court did not rule on this question; it held instead that ERISA § 4(b)(3) exempted the disputed portions of the airlines' plans from regulation under ERISA, so that ERISA § 514(a) had no bearing on the case. Our own views, however, compel us to begin with the proper construction of § 514(a). We agree with the plaintiffs that the section is broad enough to encompass the DBL.

Section 514(a) explicitly preempts "any and all State laws insofar as they may now or hereafter relate to any

21. Section 514(a) is set out in note 7 *supra*.

employee benefit plan."[22] Despite the apparent all-inclusiveness of this language, the Board argues that only laws governing ERISA's own subject matter—funding, vesting, disclosure, and the like—actually "relate to" benefit plans in the manner Congress intended. Because the DRL addresses only the level of benefits provided, a matter ungoverned by ERISA, the Board contends that § 514(a) is inapplicable to it.

Our review of the legislative history leads us to conclude that the statute is as sweeping as it seems. As other courts have noted, the legislative history of ERISA supports a broad reading of the phrase "relate[s] to" in § 514(a). The preemption provisions of the bills that preceded ERISA applied only to state laws that regulated ERISA's specific subject matters. *See* H.R. 2, § 514(a), (c), 93d Cong., 1st Sess. (1973), *reprinted in* 120 Cong. Rec. 4742 (1974) (House version); H.R. 2, § 699(a), 93d Cong., 1st Sess. (1973), *reprinted in* 120 Cong. Rec. 5002 (1974) (Senate version). The present language of § 514(a) was adopted by the Conference Committee, whose report indicated that the provision was as broad as its language. H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 383, *reprinted in* [1974] U.S. Cong. Code & Ad. News 5038, 5162. Statements in both

22. Section 514(a) does not use the term "preempt." Instead, it provides that ERISA "shall supersede" state laws relating to benefits plans. Although it might be argued that "supersede" has a narrower meaning than "preempt," *see* Brummond, *Federal Preemption of State Insurance Regulation Under ERISA*, 62 Iowa L. Rev. 57, 62 (1976), the legislative history indicates that Congress used "supersede" as an equivalent of "preempt" and that the legislature assigned the term a very broad meaning. See our review of the legislative history *infra*. *See also Wadsworth* v. *Whaland*, 562 F.2d 70, 76-77 (1st Cir. 1977), *cert denied*, 435 U.S. 980, 981 (1978).

Houses of Congress emphasized the breadth of federal preemption. *See* 120 Cong. Rec. 29197 (1974) (remarks of Rep. Dent) (§ 514(a) "reserv[es] to Federal authority the sole power to regulate the field of employee benefit plans"; conferees applied preemption principle "in its broadest sense"); *id.* at 29933 (remarks of Sen. Williams) (§ 514(a) "intended to preempt the field for Federal regulations"); *id.* at 29942 (remarks of Sen. Javits) (conference version adopted to avoid litigation concerning scope of narrower provisions of predecessor bills). Thus, most courts of appeals that have considered the issue have held that the phrase "relates to" in § 514(a) does not limit the provision to those state laws that are directed toward ERISA's subject matter. *See Buczynski* v. *General Motors Corp.*, 616 F.2d 1238, 1250 (3d Cir.), *cert. granted*, 101 S. Ct. 352 (1980); *Wadsworth* v. *Whaland*, 562 F.2d 70, 76-77 (1st Cir. 1977), *cert. denied*, 435 U.S. 980, 981 (1978); *Hewlett-Packard Co.* v. *Barnes*, 425 F. Supp. 1294, 1298-1300 (N.D. Cal. 1977), *aff'd per curiam*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978). *Cf. Marshall* v. *Chase Manhattan Bank*, 558 F.2d 680, 683 (2d Cir. 1977). *See also* Hutchinson & Ifshin, *Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974*, 46 U. Chi. L. Rev. 23, 38-43 (1978).

We agree with this interpretation. A state law "relate[s] to" employee benefit plans, and is thus subject to preemption, whenever it has a direct bearing on such plans, not merely when it parallels the federal scheme for regu-

lating them.[23] By prescribing minimum plan benefits, the DBL plainly "relate[s] to" employee benefit plans in the manner contemplated under § 514(a). Therefore, it may be preempted under that section.

That the DBL provisions are within the purview of § 514(a), however, does not necessarily mean that they are preempted, for § 514(a) excepts from preemption state laws that "relate to" benefit plans that are themselves exempted from coverage under ERISA by ERISA § 4(b).[24] Section 4(b)(3) exempts from ERISA coverage any "plan" that is "maintained solely for the purpose of complying with applicable . . . disability insurance laws." The Board contends that the DBL is exempted from preemption by this provision.

The Board's argument begins with the premises, not challenged here, that the pregnancy provisions of the DBL are "disability insurance laws" within the meaning of § 4(b)(3), and that the airlines would not provide pregnancy benefits for their employees if they were not compelled to do so by the DBL. Thus, the Board contends, any portions of the airlines' benefits plans devoted to preg-

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23. This holding is not inconsistent with our ruling in *American Tel. & Tel. Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979). *Merry* held that ERISA did not preempt the application of a state garnishment law to payments from a pension plan regulated under ERISA. As we noted, a reading of § 514(a) broad enough to include local garnishment laws would "lead to the unreasonable conclusion that Congress intended to preempt even those state laws that only in the most remote and peripheral manner touch upon" ERISA-regulated plans. *Id.* at 121. By contrast, the DBL's relation to benefits plans is anything but "remote and peripheral." It regulates the benefits provided under such plans.

24. Section 4(b) is set out in note 8 *supra*.

nancy benefits would be maintained "solely" for purposes of complying with the DBL. If this is so, the argument continues, then these portions of the plans are exempt from regulation under ERISA by virtue of § 4(b)(3). If they are exempt under § 4(b), then the DBL continues to govern them, notwithstanding § 514(a).

This argument assumes that the word "plan" as used in § 4(b)(3) can be read to mean either a whole plan or a portion of a plan, such as the specific pregnancy provisions the Board seeks to impose upon the airlines. In ruling for the Board on this issue, the district court accepted this assumption. Reasoning that ERISA contemplates "independent and concurrent obligations" under federal and state law, the court held that "those provsions of an employee plan which are maintained to comply with [state disability insurance] laws are excluded from ERISA." 485 F. Supp. at 307. In attacking the district court's ruling, the airlines argue that "plan" must mean a benefits plan in its entirety, and that their "plan[s]" were adopted largely for competitive reasons, not "solely" to comply with the DBL. In the airlines' view, § 4(b)(3) was intended to exempt small, intrastate employers whose "plan[s]" are designed only to meet the minimum requirements of state law.

We think the district court took an unduly expansive view of the role that ERISA assigns to state law in governing employee benefit plans. As discussed above, ERISA contemplates a federal occupation of the regulatory field that is very nearly total. Section 514(a) was meant to clear away all state laws bearing on benefits plans,

and the various exceptions to the general rule of federal preemption were meant to be "narrow." 120 Cong. Rec. 29933 (1974) (remarks of Sen. Williams); *id.* at 29197 (remarks of Rep. Dent). We recognize that many aspects of benefits plans generally, and of welfare benefits plans in particular, will go unregulated under this regime of broad preemption, and that § 514(a) may therefore permit abuses that Congress might otherwise have wished to avert. *See generally* Brummond, *Federal Preemption of State Insurance Regulation Under ERISA*, 62 Iowa L. Rev. 57 (1976).[25] Nonetheless, it is clear that Congress sought to stay the states' hands, at least for a certain period, with the thought that "appropriate modifications" could be made later if shown to be needed. *See* 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits). *See also* 29 U.S.C. § 1222(4); H.R. Conf. Rep. No. 93-1280, *supra*, at 361, *reprinted in* [1974] U.S. Code Cong. & Ad. News at 5140 (Joint Pension Task Force to study "effects and desirability" of ERISA preemption policy). Thus, ERISA ordinarily does not permit "independent and concurrent obligations" under federal and state law. Under ERISA, federal law will govern, even in those instances where federal governance effectively means no governance, save where Congress has clearly declared otherwise.

With these principles in mind, we conclude that the world "plan" as used in § 4(b)(3) refers to a plan as an

25. Of the various ERISA provisions, only those governing disclosure and fiduciary standards are applicable to employee welfare benefit plans. 29 U.S.C. §§ 1021-1031 (disclosure); *id.* §§ 1101-1112 (fiduciary standards). Other provisions governing vesting, participation, and funding requirements apply only to certain employee pension benefit plans. *See id.* §§ 1051(1), 1081(a)(1). *See generally* Brummond, *supra*, at 60-63.

integral unit, not to isolated and subsidiary provisions of a plan. The plain terms of the statute refer to "plan[s]," not to portions or provisions of a plan. Moreover, permitting the fragmentation of the term "plan" would disrupt the uniformity that Congress sought to achieve through § 514(a), allowing a state to remove specific disability provisions of a complex benefits scheme from coverage under ERISA merely by legislating on a particular subject. For a nationwide employer, those provisions might be subject to New York's DBL, yet also subject to ERISA requirements in states without "applicable . . . disability insurance laws," and subject to further, and probably conflicting, requirements imposed by other states that do have such laws. Congress could scarcely have intended to permit such successive layers of regulation to be imposed on certain portions of a plan otherwise subject in its entirety to ERISA alone. Thus we conclude that "plan" refers to an integral unit or program, not to selected provisions.

This does not necessarily mean that the airlines are entitled to relief against enforcement of the pregnancy provisions of the DBL. While we reject the argument that those provisions alone enable the Board to compel plaintiffs to provide minimum pregnancy benefits, the Board may be empowered to do so by the DBL as a whole. If a plaintiff's disability "plan" as a whole is maintained "solely" to comply with the requirements of the DBL as a whole, then that plan in its entirety would be exempted from ERISA under § 4(b)(3). With respect to such a plan, the Board would be free to enforce all provisions of the DBL, including those that govern pregnancy, § 514(a) notwithstanding. Be-

cause it is entirely possible that some or all of the plaintiffs do maintain disability "plan[s]" adopted "solely" to comply with the DBL, we must give content to those statutory terms.

Nothing in the legislative history of ERISA explicitly addresses the purpose of the § 4(b)(3) exemption.[26] Nonetheless, Congress's thought seems fairly clearly to have been that "plan[s]" adopted "solely" to comply with state social insurance laws were adequately regulated by state authorities and that state regulation of such plans would not unduly disrupt the ERISA scheme. In determining the meaning of the troublesome terms "plan" and "solely," it will be helpful to examine the characteristics of the social insurance programs potentially affected by § 4(b)(3).[27]

Unemployment insurance systems function in substantially the same manner in every state. Each state requires employers to contribute to a central unemployment fund. The fund is a state agency that superintends collections from employers and pays stated benefits to idled workers.[28]

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26. Section 4(b)(3) closely parallels § 4(b)(2) of the Welfare and Pensions Plan Disclosure Act of 1958, 29 U.S.C. § 303(b)(2) (repealed by ERISA), which exempted from regulation under that act "plan[s] . . . established and . . . maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation disability insurance laws." The legislative history of the WPPDA reveals as little about the meaning of these terms as does that of ERISA.

27. Section 4(b)(3) applies to workmen's compensation plans and unemployment insurance plans as well as disability plans. *See* note 8 *supra*.

28. This uniformity in administrative methods flows from the Federal Unemployment Tax Act, I.R.C. §§ 3301-3311, which imposes a payroll tax upon employers but also provides a substantial credit against this tax for payments made to a qualifying state unemployment fund. The state fund must have the characteristics specified in *id.* § 3306(f). In other respects, particularly in the level of benefits provided, state unemployment insurance systems differ widely.

Some states permit employers to provide supplemental unemployment benefits through private arrangements, but such supplemental plans are wholly independent of the state fund. They provide benefits in addition to those available from the state fund and their establishment does not relieve the employer of his obligation to contribute to the state fund. *See generally* 1B Unempl. Ins. Rep. (CCH) ¶ 2300.

Workmen's compensation systems are more diverse. Some follow the pattern established by unemployment insurance legislation and permit an employer to satisfy his obligations under state law only by participation in a state-administered insurance fund. Others permit employers to choose between participation in the state fund and the establishment of equivalent coverage through private means, as by purchasing insurance, establishing a trust or other fund, or maintaining a plan of self-insurance. Many states have no state fund and merely require employers to make satisfactory private arrangements. Where private arrangements are permitted, they are generally subject to review and approval by state authorities. *See generally* 4 A. Larson, The Law of Workmen's Compensation § 92.10 (1980).

The comparatively few states that have disability insurance laws have varying requirements. One, Rhode Island, establishes participation in a state fund as the exclusive means of compliance. Most give employers the option to participate in a state-administered fund or to provide alternate private arrangements, subject to approval by state authorities. *See generally* 4 A. Larson, *supra*, §§ 96.40, 97.42. New York falls into the latter mold. Employers may discharge their obligations to provide disability benefits by

participating in a state fund that is financed by employer and employee contributions. N.Y. Work. Comp. Law §§ 209, 210, 211(1), 214. Alternatively, employers may provide the required benefits through private insurance, a plan of self-insurance, or other "plan or agreement," subject to the Board's approval. N.Y. Work. Comp. Law § 211(2)(3)(4)(5) (McKinney 1965 & Supp. 1980-1981). The Board will approve a private disability benefits program if it provides benefits "at least as favorable" to employees as those provided by the state fund. *Id.* § 211(5); 12 N.Y. C.R.R. §§ 375.1, 358-3.1 (regulations governing approval of alternate plans).

It is relatively easy to see how Congress would classify the programs at the extreme ends of this spectrum of social insurance schemes. At one end of the spectrum are employers whom the state compels to participate in state-administered funds as the exclusive means of providing protection for their employees. In this situation, state regulation is quite comprehensive and presumably suffices to protect workers' interests. In addition, the centralization of the state's regime sharply diminishes its potential for disrupting the federal scheme under ERISA. Thus, when the state compels participation in a state-administered fund, the policies of the § 4(b)(3) exemption are fully satisfied. In the language of § 4(b)(3), the employer's program for complying with such a state law will constitute his "plan," and that plan will have been adopted "solely" to comply with the state law.

At the opposite end of the spectrum are employers who provide a type of benefit commonly associated with

social insurance schemes, but who do so voluntarily, with no compulsion by the state. Because such programs are not closely supervised by the state, they are far more susceptible to abuse than are compulsory, state-administered programs. Moreover, because such voluntary programs are typically part of a complex benefits scheme established through collective bargaining, state efforts to regulate them pose a significant risk of conflict with ERISA requirements. The policies of § 4(b)(3) do not apply to such programs, and § 514(a) would ordinarily preempt state laws purporting to regulate them. Particularly because state law does not compel employers to establish programs of this sort, it would be sensible to say, in the language of § 4(b)(3), that such programs are not maintained "solely" to comply with state laws, even if they do constitute separate "plan[s]."

The troublesome cases, falling in the middle of the spectrum, arise when state laws compel an employer to maintain *some* program, but permit him to satisfy this obligation through private arrangements that may vary from, and exceed, the state-mandated norms. In such cases, the nature and scope of the program sought to be regulated by state authorities will largely determine whether state regulation comports with ERISA policies. If the employer's program for providing the particular benefit comprises a separate administrative unit, as where an employer insures his employees against disability through a single group policy or establishes a separate disability trust, then state authorities can adequately police that unit without affecting federal authority to regulate

programs for other types of benefits. If, however, the employer's program encompasses types of benefits besides those reserved to state authority under § 4(b)(3), and if the various benefits are administered through a single vehicle, then state regulation may quickly run afoul of federal policies. The unit selected by the employer for administering the complex benefits scheme would be subject to state requirements insofar as it provided benefits enumerated in § 4(b)(3), but subject to federal requirements insofar as it provided other types of benefits. As we noted above, ERISA does not permit such regulatory disharmony.

Thus, we think that the word "plan" as used in § 4(b)(3) must refer to a benefits program as an integral administrative unit. If an employer, using a single administrative unit, provides disability benefits as part of a larger welfare scheme, comprising, for example, health insurance as well as disability benefits, then that scheme as a whole constitutes the employer's "plan." Because such a plan provides types of benefits that the states cannot permissibly require under § 514(a), the plan could not be said to be maintained "solely" to comply with state disability insurance laws. On the other hand, if an employer's disability program constitutes a separate unit, concerned predominantly with disability benefits and organized so that it is substantially independent of other benefits programs, then that program itself constitutes a "plan." Such a plan is potentially subject to state regulation under a law like the DBL.

Most disability programs that constitute separate "plan[s]" will have been adopted "solely" to comply with state disability insurance laws applicable to the employer. The airlines' argument that the employer's intentions are dispositive in determining this issue proves too much. Any employer, even the small intrastate employer at whom the airlines contend § 4(b)(3) was aimed, could credibly claim that it had adopted a disability plan in order to attract and keep good employees, smooth labor relations, and the like. Congress did not intend § 4(b)(3) to empower employers to evade state regulation by engaging in a swearing contest concerning their motives. Structural considerations, not subjective intentions, must govern the analysis under § 4(b)(3). Thus, if an employer maintains a separate disability plan that generally meets the requirements of applicable state disability insurance laws, the court should find that the plan was adopted "solely" to comply with those laws, unless compelling circumstances, not applicable to employers generally, dictate otherwise. *See Standard Oil Co.* v. *Agsalud*, 442 F. Supp. 695, 704 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (9th Cir. 1980).

Turning to the case before us, we note that the airlines' amended complaint did not clearly describe their benefits plans. It stated in general terms that "[p]laintiffs maintain various employee benefit plans, including sickness and accident disability plans, sick leave plans, and medical benefit plans," and that these plans "are funded and administered in several different ways." It is possible that some or all of the plaintiffs maintain disability benefits programs that are "plan[s]" maintained "solely" to com-

ply with state law under the analysis presented above. Such plans would be exempt from regulation under ERISA and would be subject to the DBL in its entirety, including its provisions governing minimum pregnancy benefits. Such plaintiffs would not be entitled to relief against the Board. Other plaintiffs, however, may maintain more complex benefits systems that do not employ a separate "plan" for disability. The DBL is preempted in its entirety with respect to such plaintiffs, and is wholly unenforceable against them.[29] Each plaintiff must have an opportunity to show the nature of its disability program under the analysis set forth above.

Conclusion

Insofar as the judgment of the district court enjoined enforcement of the HRL, we reverse. Insofar as the judgment dismissed plaintiffs' claims that ERISA preempts the DBL, we vacate and remand for further proceedings. No costs.

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29. Nothing in our decision today forbids the states to require employers to administer disability benefits through a separate "plan" as described herein.

Opinion of the Court of Appeals, May 11, 1981 — Burroughs Corporation

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 17—September Term, 1980

(Argued September 25, 1980 Decided May 11, 1981)

Docket No. 80-7127

BURROUGHS CORPORATION,

Plaintiff-Appellee,

v.

WERNER H. KRAMARSKY, As Commissioner of the New York State Division of Human Rights,

Defendant-Appellant.

Before:

MOORE and KEARSE, *Circuit Judges*, and TENNEY, *District Judge.**

Appeal from an order of the United States District Court for the Western District of New York, Harold P. Burke, *Judge*, declaring that federal law preempts N.Y.

* Honorable Charles H. Tenney, Senior Judge of the United States District Court for the Southern District of New York, sitting by designation.

Exec. Law § 296 (McKinney 1972 & Supp. 1980-1981), and enjoining its enforcement.

Reversed and remanded.

ANN THACHER ANDERSON, General Counsel, State Division of Human Rights, New York, N.Y., *for Defendant-Appellant.*

WILLIAM E. MCKNIGHT, Rochester, N.Y. (Robb M. Jones, Nixon, Hargrave, Devans & Doyle, Rochester, N.Y., on the brief), *for Plaintiff-Appellee.*

KEARSE, *Circuit Judge:*

This is one of three unconsolidated cases argued together on appeal. Also argued were *Delta Air Lines, Inc. v. Kramarsky*, Nos. 80-7179 and 80-7225 (*"Delta"*) and *Metropolitan Life Insurance Company v. Kramarsky*, No. 80-7185. The plaintiff here is an employer which maintains an employee benefit plan that is subject to federal regulation under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* (1976). Plaintiff is also subject to New York's Human Rights Law, N.Y. Exec. Law § 296 (McKinney 1972 & Supp. 1980-1981) ("HRL"). HRL requires that disability benefit plans such as plaintiff's provide benefits for disabilities related to pregnancy on the same basis as for other disabilities. Plaintiff's plan excludes disabilities related to pregnancy.

Plaintiff commenced the present action in the United States District Court for the Western District of New York, seeking declaratory and injunctive relief against

enforcement of the HRL on the ground that § 514(a) of ERISA provides that ERISA preempts laws such as the HRL. Plaintiff also sued under 42 U.S.C. § 1983, contending that defendant had persistently denied it an opportunity to be heard on its ERISA argument, in violation of the Due Process Clause of the Fourteenth Amendment.

Relying on *Pervel Industries, Inc. v. Connecticut Comm'n on Human Rights & Opportunities*, 468 F. Supp. 490 (D. Conn. 1978), *aff'd mem.*, 603 F.2d 214 (2d Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980), in which this Court affirmed by summary order a ruling that ERISA § 514(a) preempted a Connecticut statute similar to the HRL, the district court enjoined enforcement of the HRL with respect to plaintiff's employee benefit plans. The court did not reach plaintiff's claim under § 1983.

For the reasons discussed in our decision today in *Delta*, plaintiff's claim that ERISA preempts the HRL is untenable in light of the Supreme Court's action in *Minnesota Mining & Manufacturing Co. v. Minnesota*, 444 U.S. 1041 (1980). We therefore reverse the injunction of the district court. Since the court did not rule on the § 1983 claim, we remand for whatever further consideration plaintiff may seek.

Reversed and remanded.

Opinion of the Court of Appeals, May 11, 1981 — Metropolitan Life Insurance Company

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 19—September Term, 1980

(Argued September 25, 1980 Decided May 11, 1981)

Docket No. 80-7185

METROPOLITAN LIFE INSURANCE COMPANY,

Plaintiff-Appellee,

v.

WERNER H. KRAMARSKY, As Commissioner of the New York State Division of Human Rights, the NEW YORK STATE DIVISION OF HUMAN RIGHTS, and the NEW YORK STATE HUMAN RIGHTS APPEAL BOARD,

Defendants-Appellants.

Before:

MOORE and FEARSE, *Circuit Judges,*
and TENNEY, *District Judge.**

Appeal from an order of the United States District Court for the Southern District of New York, Whitman Knapp, *Judge,* preliminarily enjoining enforcement of N.Y.

* Honorable Charles H. Tenney, Senior Judge of the United States District Court for the Southern District of New York, sitting by designation.

Exec. Law § 296 (McKinney 1972 & Supp. 1980-1981) on grounds of federal preemption.

Reversed.

ANN THACHER ANDERSON, General Counsel, State Division of Human Rights, New York, N.Y., *for Defendants-Appellants.*

JEFFREY A. MISHKIN, New York, N.Y. (Jeffrey D. Fields, Proskauer Rose Goetz & Mendelsohn, New York, N.Y., on the brief), *for Plaintiff-Appellee.*

KEARSE, *Circuit Judge*:

This is one of three unconsolidated cases argued together on appeal. Also argued were *Delta Air Lines, Inc. v. Kramarsky*, Nos. 80-7179 and 80-7225 (*"Delta"*), and *Burroughs Corporation v. Kramarsky*, No. 80-7127. The plaintiff here is an employer which maintains employee benefit plans that are subject to federal regulation under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* (1976). Plaintiff is also subject to New York's Human Rights Law, N.Y. Exec. Law § 296 (McKinney 1972 & Supp. 1980-81) ("HRL"). HRL requires that disability benefit plans such as plaintiff's provide benefits for disabilities related to pregnancy on the same basis as for other disabilities. Plaintiff's plans exclude disabilities related to pregnancy.

Plaintiff commenced the present action in the United States District Court for the Southern District of New York, seeking declaratory and injunctive relief against enforcement of the HRL on the sole ground that § 514(a) of ERISA provides that ERISA preempts state laws such as

the HRL. Relying on *Percel Industries, Inc. v. Connecticut Comm'n on Human Rights & Opportunities*, 468 F. Supp. 490 (D. Conn. 1978), *aff'd mem.*, 603 F.2d 214 (2d Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980), in which this Court affirmed by summary order a ruling that ERISA § 514(a) preempted a Connecticut statute similar to the HRL, the district court granted a preliminary injunction against enforcement of the HRL.

For the reasons stated in our opinion in *Delta*, plaintiff's claim is untenable in light of the Supreme Court's action in *Minnesota Mining & Manufacturing Co. v. Minnesota*, 444 U.S. 1041 (1980). We therefore reverse, and remand to the district court for dismissal of the complaint.

Order and Judgment of the District Court, March 19, 1980 — Delta Air Lines, Inc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 3358 (MEL)

DELTA AIR LINES, INC., ALLEGHENY AIRLINES, INC., NATIONAL AIRLINES, INC., PIEDMONT AVIATION, INC., BRANIFF AIRWAYS, INC., NORTH CENTRAL AIRLINES, INC., SOUTHERN AIRWAYS, INC., EASTERN AIR LINES, INC., NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., OZARK AIR LINES, INC., AMERICAN AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., and UNITED AIRLINES, INC.,

Plaintiffs,

against

WERNER H. KRAMARSKY, individually and in his capacity as Commissioner of the New York State Division of Human Rights; ANN THACHER ANDERSON, individually and in her capacity as General Counsel of the New York State Division of Human Rights; the NEW YORK STATE DIVISION OF HUMAN RIGHTS, an agency of the Executive Department of the State of New York; ARTHUR COOPERMAN, individually and in his capacity as Chairman of the New York State Worker's Compensation Board; and the NEW YORK STATE WORKER'S COMPENSATION BOARD,

Defendants.

The case having come on for hearing before the court and the court having, on January 28, 1980, issued its opin-

ion with regard to all the outstanding issues in the case and it further appearing that the case is in a proper posture for final disposition, the court orders as follows:

IT IS HEREBY ORDERED that with regard to Defendants' Motion to Dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6), the motion is granted insofar as Plaintiffs' Amended Complaint claims relief against defendants Arthur Cooperman, individually and in his capacity as Chairman of the New York Worker's Compensation Board and against the New York Worker's Compensation Board, it appearing that, based upon the allegations in the Amended Complaint, no set of facts could exist which, if proven, would entitle Plaintiffs to any relief all as more particularly set forth in the court's opinion of January 28, 1980 and such claims are hereby dismissed with prejudice for failure to state a claim against these defendants upon which relief can be granted.

Further, with regard to Plaintiffs' claims against Defendants Werner J. Kramarsky, individually and in his capacity as Commissioner of the New York State Division of Human Rights, and Ann Thacher Anderson, individually and in her capacity as General Counsel of the New York State Division of Human Rights and the New York State Division of Human Rights, it appearing that there is no genuine issue of material fact and it appearing that Plaintiffs are entitled to judgment as to that portion of their complaints seeking relief against these Defendants and to certain declaratory and injunctive relief as a matter of law, IT IS HEREBY ORDERED:

(A) For the time periods referred to in the court's opinion of January 28, 1980, Plaintiffs' Employee Benefit Plans were subject to and governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC §§ 1001-1381 (1976 & Supp. I, 1977);

(B) That insofar as the New York Human Rights Law does require or may be applied or interpreted in such a fashion as to require the alteration of Plaintiffs' Employee Benefit Plans or otherwise is so interpreted or applied to require Plaintiffs to provide benefits to employees in any manner inconsistent with the terms of the Employee Benefit Plan or to award any relief against Plaintiffs or impose any penalty on Plaintiffs for failure to so modify the terms of their Employee Benefit Plans or for failure to pay benefits to any individual when such payment would be inconsistent with the terms of said Employee Benefit Plans, such law is preempted by Section 514(a) and (c) of ERISA;

(C) Defendants Kramarsky, Anderson and the New York State Division of Human Rights and their Agents, successors and employees are hereby permanently restrained and enjoined from compelling or attempting to compel Plaintiffs to alter the terms of their Employee Benefit Plans for the time periods referred to in the Court's opinion of January 28, 1980 or to take any action inconsistent with subparagraph (b) of this order;

(D) The question as to whether the New York State Division of Human Rights is authorized to make a finding

that under the New York State law the Plaintiffs have discriminated against some of their employees and that damages may be awarded accordingly has not been ruled on by the court, and this order and judgment, presented by Plaintiff, is granted by the court.

The parties shall bear their own costs and attorneys' fees.

It is so ordered.

Dated: New York, New York
February 6, 1980

/s/ MEL

U.S.D.J.

Entered March 19, 1980

Opinion of the District Court, January 28, 1980 — Delta Air Lines, Inc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 3358 (MEL)

DELTA AIR LINES, INC., ALLEGHENY AIRLINES, INC., NATIONAL AIRLINES, INC., PIEDMONT AVIATION, INC., BRANIFF AIRWAYS, INC., NORTH CENTRAL AIRLINES, INC., SOUTHERN AIRWAYS, INC., EASTERN AIR LINES, INC., NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., OZARK AIR LINES, INC., AMERICAN AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., and UNITED AIRLINES, INC.,

Plaintiffs,

against

WERNER H. KRAMARSKY, individually and in his capacity as Commissioner of the New York State Division of Human Rights; ANN THACHER ANDERSON, individually and in her capacity as General Counsel of the New York State Division of Human Rights; the NEW YORK STATE DIVISION OF HUMAN RIGHTS, an agency of the Executive Department of the State of New York; ARTHUR COOPERMAN, individually and in his capacity as Chairman of the New York State Workmen's Compensation Board; and the NEW YORK STATE WORKMEN'S COMPENSATION BOARD,

Defendants.

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STATE DIVISION OF HUMAN RIGHTS
Two World Trade Center
New York, New York 10047
Attorneys for Defendants
Of Counsel: ANN THACHER ANDERSON, ESQ.

LASKER, D. J.

Fourteen airlines operating in New York State seek declaratory and injunctive relief from the application of two New York statutes which would require them to provide complete coverage in their employee benefit plans for disabilities related to pregnancy.

The statutes in question are the Human Rights Law (HRL), N.Y. Exec. Law §§ 290-301 (McKinney 1976), and the Disability Benefits Law (DBL), N.Y. Work. Comp. Law §§ 200-242 (art. 9) (McKinney Supp. 1972-1978). In

December of 1976, the New York Court of Appeals held in *Brooklyn Union Gas Co.* v. *New York State Human Rights Appeal Board*, 41 N.Y.2d 84, 390 N.Y.S.2d 884 (1976), that the prohibition against sex discrimination contained in § 296.1(a) of the HRL bars private employers from treating pregnancy and childbirth differently from any other physical disability. On August 3, 1977, the New York Disability Benefits Law was amended to expand the definition of disability to include disabilities related to pregnancy. See N.Y. Work. Comp. Law §§ 201(9)(B) and 205(3). The statutes therefore require inclusion of pregnancy benefits in any employee benefit plan of general coverage maintained for employees in New York.

The airlines contend that the two statutes are preempted from regulating the employee plans in question by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1381 (1976 & Supp. I, 1977), and by the Railway Labor Act (RLA), 45 U.S.C. §§ 151-188 (1976). They also argue that the effect of including complete pregnancy coverage in their plans would be to increase the compensation of their female employees beyond that paid to their male employees in violation of the "equal pay for equal work" doctrine of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17 (1976), the Equal Pay Act, 29 U.S.C. § 206(d) (1976), and Executive Order No. 11246, 3 C.F.R. 339 (1964-1965 Comp.) (Sept. 24, 1965), as amended by Executive Order No. 11375, C.F.R. 684 (1966-1970 Comp.) (Oct. 13, 1967).

The State moves under Rule 12(b)(6), Fed. R. Civ. P., to dismiss for failure to state a claim upon which relief can be granted.

Developments in the Law Since the Action Was Filed

The stakes involved in this case were considerably narrowed when, in October of 1978, § 701 of Title VII was amended to provide that:

> "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . ."

Pub. L. No. 95-555, § 1, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)) (the "Pregnancy Disability Act"). The effect of the amendment is to require employers, such as those suing here, to include pregnancy disabilities in their employee benefit plans. Thus the airlines' claims for relief are rendered moot from the effective date of the statute. Accordingly, what remains for decision is the question whether the New York statutes may validly be applied to the airlines' plans from the date upon which state law was first interpreted in *Brooklyn Union Gas* to require such plans to provide benefits for pregnancy related disabilities (December 20, 1976) until the effective date of the new federal law (April 29, 1979).

I. The Airlines' Standing to Sue

The State contends that the airlines lack standing to assert that the rights of their male employees are violated by the two state statutes. It relies on *Gilbert* v. *General*

Electric Co., 59 F.R.D. 267 (E.D. Va. 1973), which, according to the State, stands for the proposition that an employer who has approved an allegedly discriminatory bargaining agreement cannot seek to represent employees who are aggrieved by the discrimination.

Even assuming that the State has properly interpreted *Gilbert*, that case appears to have no bearing on the issue here. The airlines are not attacking the terms of the collective bargaining agreement in any way; rather, they are defending them from allegedly unconstitutional interference by the State.

A number of recent decisions dealing with the right of an employer to sue on behalf of his employees appears to establish clearly the standing of the airlines here. The two state statutes impose significant obligations on the airlines themselves. Compliance with the statutes will subject them to substantial economic burdens; failure to comply could lead to sanctions from the State. Accordingly, the airlines face a sufficient risk of "injury in fact" to permit them to contest the state law. *Carey* v. *Population Services International*, 431 U.S. 678, 682-84 (1977); *Craig* v. *Boren*, 429 U.S. 190, 192-97 (1976). Moreover, the resources which the airlines command—as well as their stake in the result—assure that they will be effective advocates on behalf of their male employees. *See Singleton* v. *Wulff*, 428 U.S. 106, 112-17 (1976).

II. ERISA Preemption

Human Rights Law

The statutory language, legislative history and controlling case law all indicate that the HRL is preempted by ERISA.

Section 514(a) of ERISA provides that the federal statute "shall supersede any and all State laws *insofar as they may now or hereafter relate to any employee benefit plan* described in section 1003(a) of this title." 29 U.S.C. § 1144(a) (emphasis added). Section 514(c)(2) defines "State" to include "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, *directly or indirectly*, the terms and conditions of employee benefit plans covered by this subchapter." 29 U.S.C. § 1144(c)(2) (emphasis added). The only state statutes excluded from the operation of the preemption clause are those regulating insurance, banking, or securities, or generally applicable state criminal law. *See* 29 U.S.C. § 1144(b).

The legislative history of ERISA strengthens the conclusion that the scope of the preemption clause is fully as broad as its language suggests. Both the House and Senate Conference Committees rejected earlier versions of the clause which would have limited preemption to areas of specific conflict between state and federal law. Thus, the House version originally would have superseded state laws only "insofar as they may now or hereafter relate to the reporting and disclosure responsibilities, and fiduciary responsibilities, of persons acting on behalf of any employee

benefit plan . . . ," 120 Cong. Rec. 4742 (1974), while the Senate version would have superseded state laws only "insofar as they may now or hereafter relate to the subject matters regulated by this Act. . . ," 120 Cong. Rec. 5002 (1974). Instead of adopting one of these narrow provisions, Congress opted for broad preemption language. Committee on Labor and Public Welfare, this action was taken to avoid the possibility of:

> "endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme."

120 Cong. Rec. 29942 (1974).

The sponsors of the bill in both the House and the Senate also described the scope of the clause in sweeping terms. Senator Harrison Williams, the Senate sponsor, stated during his presentation of the bill that, with the narrow exceptions specified in the bill, the preemption principle "is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law." 120 Cong. Rec. 29933 (1974). Similarly, Congressman John Dent, the House sponsor, stated that the "crowning achivement" of ERISA was its reservation to the federal goverment of the sole power to regulte the field of employee benefit plans:

> "The conferees, with the narrow exceptions specifically enumerated, *applied this principle in its broad-*

> *est sense to foreclose any non-Federal regulation of employee benefit plans.* Thus, the provisions of section 514 would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof—including any professional society or association operating under color of law—*which would affect any employee benefit plan* as described in section 4(a) and not exempt under section 4(b)."

120 Cong. Rec. 29197 (1974) (emphasis added).

Despite this evidence of the broad impact of ERISA preemption, the State argues that both the language of the statute and its legislative history establish that Congress did not intend to preempt state anti-discrimination law. It points out that, during the congressional debate over ERISA, members of both the House and Senate were dissuaded from including an antidiscrimination clause in the statute because they were assured by the sponsors of the bill that Title VII would continue to bar discrimination in employee benefit plans.[1] Moreover, the State notes that § 514(d) of ERISA, 29 U.S.C. § 1144(d), provides that nothing in ERISA modifies existing *federal* law[2] and that § 708 of Title VII, 42 U.S.C. § 2000e-7, provides that Title VII does not exempt any person from the requirements of

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1. *See* 119 Cong. Rec. (pt. 23) 30,409-10 (Sept. 19, 1973); 120 Cong. Rec. (pt. 4) 4726 (Feb. 28, 1974).

2. "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any laws of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under such law." 29 U.S.C. § 1144(d).

state anti-discrimination law.[3] Accordingly, the State argues that (1) since ERISA does not preempt nonconflicting federal law, and (2) since Title VII permits enforcement of state law, then (3) ERISA, like Title VII, does not preempt nonconflicting state law.

Although several courts have adopted the State's "double savings" theory in analyzing the effect of ERISA's preemption clause on state anti-discrimination law, *see Bucyrus-Erie Co.* v. *Department of Industry, Labor and Human Relations*, 453 F.Supp. 75 (E.D. Wis. 1978), *aff'd*, 599 F.2d 205 (7th Cir. 1979); *Liberty Mutual Insurance Co.* v. *State Division of Human Rights*, 61 App. Div. 2d 822, 402 N.Y.S.2d 218 (2nd Dept.), *appeal denied*, 44 N.Y.2d 644 (1978); *Goodyear Tire & Rubber Co.* v. *Department of Industry, Labor and Human Relations*, 87 Wisc. 2d 56, 273 N.W.2d 786 (Cir. Ct. Dane Co. 1978), *aff'd*, No. 77-650 (Ct. App. Dist. IV, November 22, 1978), the Second Circuit appears to have rejected it. In *Pervel Industries, Inc.* v. *State of Connecticut Commission on Human Rights and Opportunities*, 468 F.Supp. 490 (D.Conn. 1978), *aff'd*, No. 78-76004 (2d Cir., April 23, 1979), the District Court (Newman, J.) held that ERISA preempted Connecticut's anti-discrimination law insofar as it required inclusion of pregnancy benefits in employee benefit plans. Judge Newman made this straightforward analysis of the preemption clause:

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3. "Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter." 42 U.S.C. § 2000e-7.

> "Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides that the provisions of subchapter I, concerning protection of employee benefit rights, 'shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . .' The broad sweep of this language and the deliberate Congressional intention to accomplish broad preemption has recently been reviewed by this Court. *National Carriers' Conference Committee* v. *Heffernan*, 454 F. Supp. 914 (D. Conn. 1978). It was there pointed out that Congress made a clear-cut decision not to identify various subjects on which state laws were to be preempted, but instead sought to avoid constant litigation over the scope of preemption by preempting with certain specific exemptions, 'all' state laws insofar as they 'relate' to plans covered by ERISA. Plainly Connecticut's anti-discrimination law, legislating specifically on the subject of disability benefits, is a law that relates to an employee benefit plan."

Id. at 491-92. Judge Newman explicitly rejected the double savings clause argument, and held that § 514(d) should be interpreted literally to apply only to federal law. *Id.* at 493.

The decision in *Pervel* was affirmed in a brief *per curiam* opinion by the Second Circuit, No. 78-7604 (April 23, 1979), in which the Court ruled:

> "This case arose before the amendment of Title VII in October 1978 by the Pregnancy Disability Act, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)). At that time state statutes, except those specifically excluded, were preempted by ERISA 'insofar as they may now or hereafter relate to any em-

ployee benefit plan.' 29 U.S.C. § 1144(a). The Connecticut Statute is subject to preemption for the reasons stated in Judge Newman's opinion, —— F. Supp. ——.

We therefore affirm on that opinion, which generally sets forth our own views."

The State contends that *Pervel* is distinguishable because the Connecticut statute applied, by its own terms, to disability benefit plans while the Human Rights Law does not. However, this distinction does not appear to make a difference. The New York Court of Appeals has interpreted the HRL to do exactly what the Connecticut law does on its face. See, e.g., *Brooklyn Union Gas Co.* v. *New York State Human Rights Appeal Board*, 41 N.Y.2d 84, 86, 390 N.Y.S.2d 884, 886 (1976) Moreover, § 514(c) of ERISA, which defines what state laws are preempted by the statute, provides:

"(c) For purposes of this section:

(1) The term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. . . .

(2) The term 'State' includes a State, any political subdivisions thereof, or any agency or instrumentality of either which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter."

29 U.S.C. § 1144(c). Thus *Pervel* appears squarely on point with the anti-discrimination law involved here and vindicates the airlines' position.[4]

4. The State argues that American Airlines' causes of action are barred because American was a party to *Brooklyn Union Gas Co.* v.

(footnote continued on next page)

This leaves the question whether the other state statute, the DBL, is preempted by ERISA. It should be noted that, as pointed out above, the DBL has applied to pregnancy benefits for a shorter period of time than the HRL. Whereas the HRL was interpreted to require inclusion of pregnancy benefits in employee plans in December of 1976, the DBL amendments went into effect only on August 3, 1977. Moreover, the DBL requires employee benefit plans to pay disability benefits for pregnancy for only eight weeks, except when the disability is the result of a complication during pregnancy. N.Y. Work. Comp. Law § 205(3).

As noted above, § 514(b) of ERISA, 29 U.S.C. §1144(b), excludes certain state laws (insurance, banking, etc.) from the coverage of its preemption clause. Section 4(b) of ERISA excludes certain employee benefit *plans* from the coverage of the statute altogether. In particular, section 4(b)(3) excludes from ERISA any plan

> "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation *or disability insurance laws.*"

New York State Human Rights Appeal Board, 41 N.Y.2d 84, 390 N.Y.S.2d 884 (1976). But American's involvement in that case arose out of a complaint against it filed with the State Division of Human Rights by an employee who was denied benefits for her 1972 pregnancy. *See American Airlines, Inc.* v. *State Human Rights Appeal Board*, 50 App. Div. 2d 450, 378 N.Y.S.2d 697 (1st Dept.), *rev'd*, 41 N.Y.2d 84, 390 N.Y.S.2d 884 (1976). Since ERISA did not become effective until January 1, 1975, American could not have argued in *Brooklyn Union Gas* that the claim against it was void because ERISA preempted the provisions of the HRL underlying that claim. Accordingly, American's participation in that case does not bar it from urging here that those provisions of the HRL have since been preempted.

29 U.S.C. § 1003(b)(3) (emphasis added). The question therefore naturally exists whether the DBL is not excluded from the statute by the very terms of ERISA. Since the original briefs on the motion to dismiss were submitted prior to the amendment of the DBL, we requested supplemental briefs on this point.

The airlines argue that section 4(b)(3) should be interpreted to apply literally to plans maintained "solely" to comply with state disability insurance laws. They point out that section 4(b) appears to exclude from ERISA entire *plans* which are maintained to comply with state disability laws rather than individual provisions. Accordingly, they argue that the section is intended to apply to plans which are maintained only to meet the minimum requirements of state law, such as plans maintained by small, intrastate employers, in which the types of abuses that ERISA is designed to avoid are minimal. Any other interpretation would, in their view, lead to the unlikely result of removing their plans from the operation of ERISA.

The State contends, on the other hand, that the congressional purpose behind the "exclusionary sections" of ERISA was to "permit the expression of State policy *with regard to those provisions* of employee benefit plans pertaining directly to the requirements of" each state's workmen's compensation laws. (Supp. Mem. of April 19, 1978 at 2) (emphasis added) The sole reason the airlines would amend their plans to include pregnancy benefits now, the State continues, would be to comply with the new DBL amendments. Thus that part of their plans which would

provide pregnancy benefits would be "maintained solely" to comply with the state law and therefore fall squarely within the exclusion of section 4(b)(3).

The legislative history on this point is characteristically unilluminating. Nor is there any case law directly on point. As a matter of common sense, however, the State appears to have the better of the argument. For example, section 4(b)(3) indicates a tolerance of state workmen's compensation laws. However, if the airlines' interpretation of the provision were adopted, unreasonable conflicts would exist between the treatment of workmen's compensation not subject to ERISA laws and other employee benefit plans subject to ERISA. Thus any attempt by a state to impose the requirements of its workmen's compensation laws on an employee benefit plan would result in the wholesale exclusion of that plan from ERISA. Alternatively, the state would be limited to applying its law to only a smattering of small, local employers while any employer whose plan was not maintained solely to comply with state law would escape the operation of the workmen's compensation laws altogether. The interpretation provided by the State is more practical and persuasive; that is, that ERISA and state workmen's compensation laws create independent and concurrent obligations and that those provisions of an employee plan which are maintained to comply with such state laws are excluded from ERISA.

Accordingly, we conclude that application of the DBL in this case is not barred by ERISA.

III. Preemption by the Railway Labor Act

The airlines contend that the Railway Labor Act, 45 U.S.C. §§ 151-188, (to which the airlines are subject under 45 U.S.C. § 181) preempts the DBL from altering the terms of collectively bargained employee benefit plans.

The classic concern of federal labor law preemption is to prevent the states from interfering with the process by which an employer and his employee negotiate a collective bargaining agreement. Thus, the Supreme Court held in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959), that:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."

The airlines argue that "[I]f states are preempted from influencing the collective bargaining *process, a fortiori*, states should be preempted (with certain limitations) from dictating the *terms* of the agreement which would otherwise be the product of that process." (Memorandum in Opposition at 57-58) They note the Supreme Court's statement in *Lodge 76, International Association of Machinists & Aerospace Workers* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 153 (1976) that:

> "Our decisions since *Briggs-Stratton* have made it abundantly clear that state attempts to influence the substantive terms of collective-bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB."

The airlines rely in particular on two Supreme Court decisions in which states were prohibited from influencing negotiated wage rates. In *California* v. *Taylor*, 353 U.S. 553 (1957), the state contended that its civil service law, and not the employees' collective bargaining agreement, governed the wages and working conditions of a railroad. The Court held that the RLA applied to the railroad and that:

> "Under the Railroad Labor Act, not only would the employees of the Belt Railroad have a federally protected right to bargain collectively with their employer, but the terms of the collective-bargaining agreement that they have negotiated with the Belt Railroad would take precedence over conflicting provisions of the state civil service laws."

Id. at 561 (footnote omitted). In *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U.S 283 (1959), the state of Ohio enjoined implementation of a collectively bargained agreement governing a wage scale specially adapted to the trucking business. The Supreme Court reversed, holding that the state was precluded from applying its law to prohibit the contracting parties from carrying out the terms of a collectively bargained agreement. The airlines emphasized the following language from the Supreme Court's opinion:

> "Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty, *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448; and federal law sets some outside limits (not contended to be exceeded here) on what their agreement may provide, see *Allen Bradley Co.* v. *Local Union*, 325 U.S 797; *cf. United States* v. *Employing Plasterers Assn.*, 347 U.S. 186, 190. We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. *Cf. California* v. *Taylor*, 353 U.S. 553, 566-567. Since the federal law operates here, in an area where authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State."

Id. at 296. The airlines take the position that, "under the guise of eliminating discrimination", the state here is interfering with the terms of a federally mandated collective bargaining agreement which "go to the heart of the economic relationships between labor and management". (Memorandum in Opposition at 71).

Malone v. *White Motor Corp.*, 435 U.S. 497 (1978), sets out the general principles governing preemption of state law by federal statutes in the context of a pension benefits plan. *Malone* dealt with Minnesota's Private Pension Benefits Protection Act which altered the terms of a collectively bargained pension plan by imposing additional burdens on the employer. The Court noted that "[t]he purpose of Congress is the ultimate touchstone" in deter-

mining whether the state law was preempted by the National Labor Relations Act, but that:

> "Often Congress does not clearly state in its legislation whether it intends to pre-empt state laws; and in such instances, the courts normally sustain local regulation of the same subject matter unless it conflicts with federal law or would frustrate the federal scheme, or unlesss the court's discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States. *Ray* v. *Atlantic Richfield Co., ante,* at 157-158; *Jones* v. *Rath Packing Co.,* 420 U.S. 519, 525, 540-41 (1977); *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)."

Id. at 504.

Moreover, *Garmon* and *Lodge 76* recognized exceptions to federal preemption of state law in the field of labor relations. States may enact legislation which affect the terms of a collective bargaining agreement where:

> 1. the conduct regulated by the state touches interests "so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [a court] could not infer that Congress had deprived the States of the power to act." *Garmon, supra,* 359 U.S. at 244; or
>
> 2. the state regulations pertain to activity that is "a merely peripheral concern" of federal labor policy, *Lodge 76, supra,* 427 U.S. at 137; *see Garmon, supra,* 359 U.S. at 243.

In *Goodyear Tire & Rubber Co.* v. *Department of Industry, Labor and Human Relations,* No. 77-650 (Ct. App.

Dist. IV, November 22, 1978), the Wisconsin Court of Appeals concluded that elimination of discrimination fell within the "deeply rooted interest exception" to federal preemption. *Goodyear* involved essentially the same issue presented here: whether the anti-discrimination law barred disparate treatment for purposes of an employee benefits plan of disabilities stemming from pregnancy and those resulting from other causes. Goodyear contended, *inter alia*, that the NLRB preempted Wisconsin's anti-discrimination law insofar as it altered elements of a collective bargaining agreement.

In an analysis fully applicable here, the court held that the state law was not preempted. The court found that:

> "Sex discrimination in Wisconsin touches interests deeply rooted in this state. Wisconsin has prohibited sex discrimination in employment since 1961. Wisconsin has promulgated a massive amount of legislation forbidding sex discrimination.
>
> The commitment of this state to elimination of sexual discrimination in employment prohibits us, 'in the absence of compelling congressional direction.' [*Garmon*], 359 U.S. at 244, from inferring that Congress has deprived this state of the power to act when a collective bargaining agreement, subject to the NLRA, conflicts with Wisconsin policy on sex."

Id. at 32 (footnotes omitted). The court concluded that the Wisconsin statute did not frustrate the intent and purposes of federal labor law. Conceding that federal law did not (at that time) invalidate Goodyear's plan, *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), the court held that the state was permitted to grant greater protection

to women than the federal government, because the Wisconsin law was not preempted.

New York's interest in eliminating sex discrimination is at least as deeply rooted as Wisconsin's and the amendments to the DBL designed to ensure coverage in employee benefit plans for pregnancy related disabilities no more frustrate the intent and purposes of federal labor law than the similar provisions of the Wisconsin statute. Adopting the reasoning of the *Goodyear* court in this regard, we conclude that application of the DBL in this case is not preempted by the Railway Labor Act.

IV. Conflict with Federal Anti-Discrimination Law.

The airlines contend that the provisions of the DBL requiring them to provide coverage in their employee benefit plans for disabilities related to pregnancy conflict with the "equal pay for equal work" provisions of Title VII, the Equal Pay Act of 1963, and Executive Order No. 11246, and are therefore invalid under the supremacy clause. The gist of the airlines' argument is that to provide coverage for pregnancy related disabilities is to compensate women as a class more than men as a class, which, according to the airlines, is to discriminate against male employees "on the basis of sex."

The airlines rely principally on the Supreme Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). There the court held that employee benefit plans that exclude pregnancy related disabilities from coverage do not violate Title VII. It does not follow, however, as the airlines contend, that plans that include coverage for

pregnancy related disabilities do violate Title VII. That the statute does not require coverage does not mean that it forbids it.

The Supreme Court has never adopted the view that an employment practice is illegal *simply* because it benefits members of one sex more than members of the other. Title VII forbids discrimination on the basis of "gender as such"—that is, it forbids an employer from dividing employees into two classes, the class of male employees and the class of female employees, and treating those two classes differently with respect to "compensation, terms, conditions, or privileges of employment" (unless the employer can establish that in the circumstances sex is a "bona fide occupational qualification"). 42 U.S.C. § 2000e-2. Title VII does *not* forbid an employer from dividing employees into classes on the basis of some other factor, and treating those classes differently, even though the different treatment may fall more heavily on members of one sex than on members of the other, unless the employer's practice is a pretext designed to effect an invidious discrimination against members of one sex or the other. This is so even though the Court has recognized that in some circumstances a showing of "disproportionate impact" creates a presumption of invalidity that the employer must rebut by demonstrating that the classification involved serves a legitimate function. *See Gilbert*, *supra*, 429 U.S. at 136-37; *Washington* v. *Davis*, 426 U.S. 229, 246-47 (1976); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971).

Properly characterized, the airlines' argument is one of disproportionate impact. They note that providing coverage for pregnancy related disabilities benefits some women but no men, and argue that this is to discriminate between men and women on the basis of sex. But in *Gilbert, supra*, the Supreme Court rejected just this sort of analysis. In holding that an employer's failure to provide coverage for pregnancy related disabilities was not discrimination "based on sex," the Court, quoting from its earlier opinion in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) (rejecting a constitutional challenge to a state employee benefits plan that did not include such coverage), stated:

> " 'While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . . Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or other other, *lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis*, just as with respect to any other physical condition.' "

429 U.S. at 134-35 (quoting 417 U.S. at 496 n.20) (emphasis added).

The real distinction involved here, as described in *Gilbert* and *Geduldig*, is not that between women and men, but that between pregnant women and nonpregnant persons. It is quite true that the amendments to the DBL benefit "pregnant women" at the expense of "nonpregnant persons" (including many female employees), and it could be argued that this distribution of benefits is unfair

to "nonpregnant persons." It is equally true that the amendments benefit women as a class at the expense of men as a class, and it could be argued that this distribution of benefits is unfair to men. But "the question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address." *City of Los Angeles Department of Water and Power* v. *Manhart*, 435 U.S. 702, 709 (1978). The New York legislature has addressed that question and determined that whatever class inequities may be involved in ensuring coverage for pregnancy related disabilities in employee benefit plans are warranted by the social benefits of such coverage.

The invalidity of the airlines' analysis is confirmed by the decision of the Supreme Court in *City of Los Angeles Department of Water and Power* v. *Manhart, supra*, 435 U.S. 702 (1978), which invalidated the Los Angeles Department of Water and Power's requirement that its female employees make larger contributions to its pension fund than its male employees during the term of their employment, to make up for the fact that women as a class live longer than men, and consequently collect more pension benefits than men following retirement. The Department argued that *not* to require larger contributions from its female employees would violate Title VII because it would require male employees to subsidize the pension benefits of female employees, just as the airlines argue here that *not* to exclude coverage for pregnancy related disabilities would violate Title VII because it would require male employees to subsidize the disability benefits of female employees (though, as indicated above, the actual

effect would be to require male employees and female employees who do not become pregnant to subsidize the benefits of those female employees who do become pregnant). However, in *Manhart* the Court rejected the claim that practices that have a "disproportionately heavy impact on male employees" are illegal *per se*, noting that "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another." 435 U.S. at 170 n.20 (emphasis in original).

Manhart emphasized that Title VII's

> "focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. . . . [T]he basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes."

Id. at 708-09.

The fundamental flaw of the airlines' argument that to provide coverage for pregnancy related disabilities would be to discriminate against men is that it focuses on fairness to classes rather than fairness to individuals. When the effects of the amendments to the DBL are analysed in a gender neutral manner, it is clear that no *individual* is compensated more than any other, since each individual's compensation with respect to disability benefits is simply that individual's *pro rata* share of the total cost of the benefits program. The airlines objection that the amount they must pay as insurance premiums for employee benefits coverage will vary depending upon how many women work for them is of no moment. Assuming that this is true, it means only that the more women a company

employs the larger will be its contribution on behalf of each employee.

Although this discussion has focussed on Title VII, the conclusion that the amendments to the DBL do not require employers to compensate any women more than any man defeats the airlines' claims under the Equal Pay Act and Executive Order No. 11246 as well. In sum, as a matter of law the DBL amendments do not conflict with federal anti-discrimination laws. Accordingly, that portion of the complaint that seeks a declaration to the effect that they do fails to state a claim upon which relief can be granted.

V. Conclusion

We conclude that to the extent that the New York Human Rights Law obliges the airlines to provide full coverage in their employee benefit plans for disabilities related to pregnancy, it is preempted by ERISA; that the provisions of the Disability Benefits Law that require the airlines to provide limited coverage for such disabilities are not preempted by ERISA or the Railway Labor Act; and that those provisions of the Disability Benefits Law do not conflict with federal anti-discrimination laws.

Submit order on notice.

Dated: New York, New York
January 28, 1980

MORRIS E. LASKER
U.S.D.J.

Correcting Memorandum, Judge Lasker, Dated February 4, 1980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 3358 (MEL)

DELTA AIR LINES, INC., et al.,

Plaintiffs,

against

WERNER H. KRAMARSKY, et al.,

Defendants.

LASKER, D. J.

In my Opinion in this case dated January 28, 1980, the following changes should be made:

Page 6, six lines from bottom:

"87 Wisc. 2d 56, 273 N.W. 2d 786 (Civ. Ct. Dane Co. 1978)" should read "20 FEP Cases 1789 (BNA) (Cir. Ct. Dane Co. Feb. 7, 1978)"

Page 6, five lines from bottom and page 14, line 6:

"No. 77-650" should read "87 Wisc. 2d 56, 273 N.W. 2d 786"

Page 14, six lines from bottom:

"*Id.*, at 32 (footnotes omitted)" should read "*Id.* at ———, 273 N.W. 2d at 799 (footnote omitted)."

Dated: New York, New York
February 4, 1980

/s/ MORRIS E. LASKER

U.S.D.J.

Judgment of the District Court, January 14, 1980 — Burroughs Corporation

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

Civ. 79-778

BURROUGHS CORPORATION,

Plaintiff.

vs

WERNER H. KRAMARSKY, as the Commissioner of the New York State Division of Human Rights,

Defendant.

This action came on for a hearing before the Court, honorable Harold P. Burke, District Judge, presiding, and the issue having been duly heard, and a decision having been duly rendered, granting a preliminary injunction, and pursuant to the stipulation of the parties that based upon findings of fact and conclusions of law made in the decision of the Court dated November 14, 1979, the record is complete and a permanent injunction and declaratory judgment should thereupon issue,

IT IS ORDERED AND ADJUDGED:

1. That the defendant is permanently enjoined from prosecuting and enforcing complaints filed by female em-

ployees of Plaintiff between January 1, 1975 and April 1, 1979, where such employees allege that Plaintiff discriminated against them on the basis of sex in refusing to pay disability benefits for pregnancy-related disabilities;

2. That under the terms of ERISA Section 514(a) Plaintiff has no obligation to pay benefits to its employees for any pregnancy-related disability arising between January 1, 1975 and April 1, 1979;

3. That the parties bear their own costs of this action.

Dated: Rochester, New York
January 14, 1980

/s/ HAROLD P. BURKE
United States District Judge
Western District of New York

Stipulation, Dated January 11, 1980, Burroughs Corporation

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

Civ. 79-778

BURROUGHS CORPORATION,

Plaintiff,

vs

WERNER H. KRAMARSKY, as the Commissioner of the New York State Division of Human Rights,

Defendant.

It is hereby stipulated, by and between William E. McKnight, Esq., counsel for Plaintiff, and Ann T. Anderson, Esq., counsel for Defendant, as follows:

1. The record in this action is complete;

2. Pursuant to the findings of fact and conclusions of law in the decision and order of this Court dated November 14, 1979, which granted Plaintiff a preliminary injunction, Plaintiff is entitled to permanent injunctive relief;

3. Pursuant to the findings of fact and conclusions of law in the Court's decision and order dated November 14, 1979, Plaintiff is entitled to a declaratory judgment that under the terms of ERISA Section 514(a), it has no obligation to pay disability benefits to its employees for any pregnancy-related disabilities arising between January 1, 1975 and April 1, 1979;

4. Final judgment should be entered on the declaratory judgment and permanent injunction;

5. Defendant withdraws its motion for certification pursuant to 28 U.S.C. § 1292(b);

6. Because Defendant disagrees with the findings of fact and conclusions of law in this Court's decision and order dated November 14, 1979, which form the basis for the final judgment herein, Defendant's right to appeal from the final judgment is specifically preserved.

Dated: January 11, 1980

/s/ William E. McKnight

William E. McKnight
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Rochester, New York 14603

/s/ Ann Thacher Anderson

Ann Thacher Anderson
General Counsel
New York State Division of
Human Rights
Attorneys for Defendant
Office and P.O. Address
Two World Trade Center
New York, New York 10047

So Ordered

/s/ Harold P. Burke

Harold P. Burke
United States District Judge

1/14/80

Decision and Order of the District Court, November 14, 1979 — Burroughs Corporation

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil 79-778

BURROUGHS CORPORATION,

Plaintiff,

vs.

WERNER H. KRAMARSKY as the Commissioner of the New York State Division of Human Rights,

Defendant.

Nixon, Hargrave, Devans & Doyle
Lincoln First Tower
Rochester, N.Y. 14603
Attorneys for plaintiff
(William E. McKnight, of counsel)

Ann Thacher Anderson
General Counsel
State Division of Human Rights
Two World Trade Center
New York, N.Y. 10047
Attorney for defendant

Plaintiff requests injunctive and declaratory relief, prohibiting the Commissioner of the New York State Division of Human Rights from further prosecuting and en-

forcing decisions and orders regarding discrimination complaints filed by employees of plaintiff and declaring the rights and obligations of plaintiff regarding pregnancy-related disabilities under the terms of its disability benefits plan. Plaintiff bases its request upon Section 514(a) of the Employee Retirement Income Security Act of 1974, which preempts all state regulation of employee benefit plans.

In 1974, Congress passed the Employee Retirement Income Security Act, 29 U.S.C. Sections 1001 et seq., finding that employee benefit plans substantially affect interstate commerce as well as the well-being and security of millions of employees and their dependents. Congress also found that inconsistent and inadequate efforts characterized the prior state attempts at benefit plan regulation and consequently decided to fully occupy the field.

The Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001 et seq., contains the following preemption section at 29 U.S.C. Section 1144(a): "Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975." The term "State laws" in this section includes "all state laws, decisions, rules, regulations, or other state action having the effect of law." 29 U.S.C. Section 1144(c)(1).

"Employee benefit plan" is defined at 29 U.S.C. Section 1002(a) and (3) to include: "any plan, fund, or pro-

gram . . . established or maintained by an employer or by an employee organization, or by both . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . ."

Burroughs Corporation formulated an employee benefit plan prior to January 1, 1975 to compensate its employees for disabilities unrelated to employment. Since its disability plan is maintained for the purpose of providing benefits for participants or their beneficiaries in the event of disability it is an "employee benefit plan" under ERISA.

Commencing on March 25, 1977, a series of complaints were filed with the New York State Division of Human Rights by female employees of plaintiff. Each of the complainants alleged that she had been denied disability benefits for periods of disability related to pregnancy. Such denials were alleged by complainants to constitute discriminatory practices on the basis of sex, contrary to section 296 of the Executive Law of New York (Human Rights Law).

In reviewing the complaints, the Division's Regional Director determined that the Division had jurisdiction and that each complaint was supported by probable cause. With the exception of two complaints which have not yet been reached, each complaint was directed for hearing. At these hearings various Division hearing examiners found that each complainant had been denied disability benefits contrary to Section 296.

In their recommended findings of fact, decisions and orders, the hearing examiners directed plaintiff to pay

designated sums to each complainant representing amounts of disability benefits with interest claimed by the complainants; to restore all lost rights, benefits and privileges to each complainant; to provide medical and disability benefits to a class of all plaintiff's employees with pregnancy-related disabilities which had occurred within one year of the filing of the complaints; and to cease and desist from further discriminatory practices against any employee or individual because of sex.

The defendant affirmed these decisions and orders in all respects. Plaintiff appealed to the New York State Human Rights Appeal Board, which substantially affirmed defendant's orders.

Because defendant is authorized to enforce his determinations and those of the Appeal Board, plaintiff seeks to enjoin defendant's further prosecution and enforcement of any and all complaints or orders pertaining to pregnancy related disabilities commencing between January 1, 1975 (the effective date of ERISA), and April 1, 1979 (the effective date of P.L. 95-355, amending Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq., to require payment of pregnancy-related disability benefits). Also sought is a declaration of plaintiff's rights and obligations under ERISA Section 514(a) with regard to pregnancy-related disabilities for such period.

Federal courts have upheld the constitutionality of ERISA in determining that the Act preempts state regulation of health benefit plans and that the ERISA preemption section moots all state laws unless specifically exempted by the Act. *Pervel Industries, Inc.* vs. *State of Connecticut*

Commission on Human Rights, 468 F.Supp. 490 (D.Conn. 1978), affirmed 603 F.2d 214 (2d cir. 1979).

In *Pervel* the district court examined the preemptive effect of ERISA where discrimination claims based on pregnancy benefits were filed pursuant to state law. There, two female employees alleged that their employer had denied disability benefits for leaves of absence relative to pregnancy. After the state fair employment agency initiated an investigation of the alleged discriminatory practices, the employer sought injunctive and declaratory relief prohibiting the further prosecution of these claims by the state agency. In granting the employer's motion for summary judgment, the district judge stated: "Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides that the provisions of subchapter I, concerning protection of employee benefit rights, "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . ." The broad sweep of this language and the deliberate Congressional intention to accomplish broad preemption has recently been reviewed by this court. "*National Carriers' Conference Committee* vs. *Heffernan,* 454 F.Supp. 914 (D.Conn. 1978). It was there pointed out that Congress made a clear-cut decision not to identify various subjects on which state laws were to be preempted, but instead sought to avoid constant litigation over the scope of preemption by preempting, with certain specific exceptions, "all" state laws insofar as they "relate" to plans covered by ERISA. Plainly Connecticut's anti-discrimination law, legislating specifically on the subject of disability benefits, is a law that relates to an employee benefit plan. There is

no requirement that Congress identify the several categories of state laws it wishes to preempt. Having elected to preempt all laws relating to covered plans, and to specify the categories of state laws that are not preempted, 29 U.S.C. §§ 1144(b)(2)(A), (b)(4), Congress is entitled to have its clearly expressed intentions carried out. 468 F.Supp. 491-2."

The district judge also dismissed the defendant's contention that section 708 of Title VII, 42 U.S.C. Section 2000e-7, in preserving state anti-discrimination laws, also precludes preemption of those laws by ERISA. On this point the district judge noted: "Section 514(d) of ERISA preserves federal law. Connecticut's anti-discrimination law does not become a federal law simply because Title VII preserves it validity as against a claim or preemption by Title VII. Nor is the textual argument significantly enhanced by focusing on § 514(b)'s requirement that ERISA should not be construed to "impair" any law of the United States. Preemption of Conn. Gen. Stat. § 31-126(g) by ERISA does not impair any federal law. Title VII did not create new authority for state anti-discrimination laws; it simply left them where they were before the enactment of Title VII. Whatever is prohibited by Title VII remains prohibited under ERISA, but exclusion of disability benefits for pregnancy does not violate Title VII. *Gilbert* v. *General Electric Corp.*, 429 U.S. 125 (1976), 468 F.Supp at 493." On April 23, 1979 the Second Circuit affirmed the District Court's decision on the opinion below, stating that the district judge's opinion ". . . generally sets forth our own views." *Pervel Industries* v. *State of Connecticut Commission on Human Rights*, 603 F.2d 214 (2 cir. 1979).

The holding in *Pervel* is clear. Because plaintiff's disability plan is within the regulatory scope of ERISA, state regulation is preempted. This includes the New York State Human Rights law, the effect of which on disability benefits plans and pregnancy is indistinguishable from the Connecticut statute struck down in *Pervel*. The New York Human Rights Law has no applicability to plaintiff's disability benefits plan subsequent to the effective date of ERISA Section 514(a).

The defendant acted improperly in finding that the Division had jurisdiction over these complaints and has no authority to further enforce or prosecute these claims.

Presented to this court is the necessity to vindicate a paramount federal interest—the enforcement of ERISA's express intent to preempt a given regulatory field. As stated by the Second Circuit in a closely related case involving ERISA preemption: ". . . surely the interpretation of a federal statute providing for exclusive jurisdiction in the federal courts presents a federal question to be decided by that court and not the state tribunal." *Marshall* vs. *Chase Manhattan Bank (Nat. Ass'n.)*, 558 F.2d. 680, 683 (2 cir. 1977).

While plaintiffs's federal question has been raised in the state administrative process, both the importance of the issue and the inadequacy of the state forum make it imperative that this court consider the ERISA preemption issue. By their conduct the defendant Commissioner, as well as the Appeals Board, have demonstrated their unwillingness and incompetence to reach plaintiff's federal claim. Consequently, further pursuance of plaintiff's un-

doubted federal remedy through the state adjudicative process would be futile. In these circumstances this court may propertly exercise its equitable powers and grant the relief requested by plaintiff.

Defendant's processing of complaints filed by Burroughs' employees demonstrates the futility of plaintiff's attempts to raise its federal issues within the state administrative proceedings. Plaintiff's attempts were met with prejudgment, bias, and repeated violations of its elemental due process right to be heard.

Any attempt by plaintiff to raise its federal constitutional issues was, and is likely to remain in the future, an exercise in futility.

The Supreme Court has recognized that similar bias and prejudgment by an administrative body justifies the interposition of a federal court's injunctive and declaratory powers. *Gibson* vs. *Berryhill*, 411 U.S. 564, 579 (1973).

Nor does the fact that an appeal is available disqualify this court from consideration of plaintiff's federal claim. *Gibson* vs. *Berryhill*, supra, at 577.

Defendant's adjudicative procedures are so tainted that plaintiff has not received, nor can it expect to receive, a fair hearing on its federal constitutional claim. Such circumstances authorize this court to enjoin defendant from any further prosecutions of the complaints against plaintiff, and permit a declaration of plaintiff's rights under ERISA Section 514(a).

An injunction will lie against the enforcement of state law by an officer of a state administrative body where the possibility of irreparable harm can be shown. *Stami-*

carbon, N.V. vs. *American Cyanamid Co.*, 506 F.2d. 532, 536 (2 cir. 1974).

Should plaintiff be compelled to comply with the decisions and orders of defendant as affirmed by the Appeal Board, immediate harm will be inflicted. Plaintiff will be required to pay the complainants in excess of $10,000 in claimed disability benefits, plus interest. Plaintiff will also be required to restore valuable rights and benefits which each complainant allegedly lost due to pregnancy disability.

Plaintiff's right to engage in business and hiring activities without interference is a valuable property right which cannot be unduly impaired. Should plaintiff be improperly required to correct alleged discriminatory practices regarding female employees, plaintiff's ability to hire such employees will be impaired in the future due to a tainted business reputation arising from these proceedings. Plaintiff's reputation in the business community and good will will be directly and adversely affected. As there is no ascertainable standard by which injuries of this nature can be measured, this alone indicates that the harm threatened will be irreparable. *Dino DeLaurentiis Cinematografica* vs. *D-150, Inc.*, 366 F.2d. 373, 375 (2 cir. 1966).

In a closely related situation, it has also been urged that irreparable harm exists in the form of an injury to the public interest in uniform administration and enforcement of ERISA. *Marshall* vs. *Chase Manhattan Bank*, 558 F.2d 680, 682 (2 cir. 1977). This factor is particularly compelling in the instant case, for Burroughs, as a nationwide employer, will face conflicting interpretations of a federal law should its requested relief be denied.

Injunctive relief in this case would also avoid a multiplicity of suits. Currently plaintiff's employees have filed fourteen separate claims against plaintiff pursuant to Section 296 of the Executive Law of New York. However, should class-wide relief be permitted for similarly situated employees of plaintiff, these additional claims will be contested and further legal action will arise. The likelihood of these multiple actions on common issues of law and fact, in addition to those already under prosecution, requires this court, under equitable principles, to enjoin defendant's further prosecution and enforcement of these claims and to resolve finally the issues of law presented by these complaints. *Telephonics Corp.* vs. *Lindly & Co.*, 291 F.2d 445 (2 cir. 1961).

This court finds, (1) plaintiff will suffer irreparable injury if its prayers for preliminary and permanent injunction relief are not granted, (2) plaintiff is likely to succeed on the merits of this complaint, (3) the granting of injunctive relief to the plaintiff outweighs the interests of the defendant.

On due consideration it is hereby.

ORDERED that the defendant pending this suit is enjoined from prosecuting and enforcing complaints filed by female employees of plaintiff prior to April 1, 1979 where such employees allege that plaintiff discriminated against them on the basis of sex in refusing to pay disability benefits for pregnancy-related disabilities. This court will determine the rights and obligations of plaintiff and plaintiff's employees regarding such benefits under the terms

of ERISA Section 514(a), subsequent to January 1, 1975. This court will on application set the matter for a hearing on plaintiff's application for a permanent injunction and for a declaratory judgment.

/s/ HAROLD P. BURKE
HAROLD P. BURKE
United States District Court

November 14, 1979.

Order of the District Court, February 14, 1980 — Metropolitan Life Insurance Company

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

80 Civ. 860 (WK)

METROPOLITAN LIFE INSURANCE COMPANY,

Plaintiff.

against

WERNER H. KRAMARSKY, as Commissioner of the New York State Division of Human Rights, the NEW YORK STATE DIVISION OF HUMAN RIGHTS and the NEW YORK STATE HUMAN RIGHTS APPEAL BOARD,

Defendants.

A motion having been made by plaintiff METROPOLITAN LIFE INSURANCE COMPANY for a preliminary injunction, and upon the complaint and the affidavit of Joseph L. Rubsam, sworn to on February 13, 1980, and the Court on February 13, 1980 having heard Proskauer Rose Goetz & Mendelsohn by Jeffrey A. Mishkin, Esq., attorneys for plaintiff, in support of the motion, and Ann Thacher Anderson, Esq., General Counsel of defendant NEW YORK STATE DIVISION OF HUMAN RIGHTS, in opposition to the motion, and the Court on February 14, 1980 having heard additional argument by

counsel for plaintiff in support of the motion and by David King, Esq., representing all defendants, in opposition to the motion, and upon the statements of facts by counsel for plaintiff and defendants made on the record on February 14, 1980, and this Court's decision stated on the record on February 14, 1980, it is hereby

ORDERED, pursuant to Rule 65 of the Federal Rules of Civil Procedure that, pending a final determination of this action, defendants WERNER H. KRAMARSKY, as Commissioner of the New York State Division of Human Rights, the NEW YORK STATE DIVISION OF HUMAN RIGHTS and the NEW YORK STATE HUMAN RIGHTS APPEAL BOARD, their successors, officers, agents, servants, employees and attorneys are hereby enjoined from further prosecuting the proceedings, enforcing any orders, or adjudicating any issues, with respect to the complaints filed with the New York State Division of Human Rights against plaintiff by Diana Baraba, Cheryl M. Parker, Jean Osborne and Marie Ann Spezia, and from taking any other action which relates to any employee benefit plan maintained by plaintiff and covered by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.* ("ERISA").

Nothing in this order is intended to preclude amendments, consistent with the laws and regulations of the State of New York, to the complaints of Diana Baraba, Cheryl M. Parker, Jean Osborne and Marie Ann Spezia, copies of which are annexed to the affidavit of Joseph L. Rubsam, to the extent that any such amendment in no way relates to the denial of benefits for pregnancy or pregnancy-related

conditions under employee benefit plans maintained by plaintiff and covered by ERISA, or to any provision or provisions of any employee benefit plain maintained by plaintiff which is covered by ERISA.

So Ordered.

Dated: New York, New York
February 14, 1980

/s/ Whitman Knapp

U. S. D. J.

A True Copy
Raymond F. Burghardt, Clerk

By J. McMaher

Deputy Clerk

Notice of Appeal — Delta Air Lines, Inc.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 80-7179

DELTA AIR LINES, INC., ALLEGHENY AIRLINES, INC., NATIONAL AIRLINES, INC., PIEDMONT AVIATION, INC., BRANIFF AIRWAYS, INC., NORTH CENTRAL AIRLINES, INC., SOUTHERN AIRWAYS, INC., EASTERN AIR LINES, INC., NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., OZARK AIR LINES, INC., AMERICAN AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., and UNITED AIRLINES, INC.,

Plaintiffs-Appellees-Cross-Appellants,

v.

WERNER H. KRAMARSKY, Individually and in his capacity as Commissioner of the New York State Division of Human Rights; ANN THACHER ANDERSON, Individually and in her capacity as General Counsel of the New York State Division of Human Rights; The NEW YORK STATE DIVISION OF HUMAN RIGHTS, an agency of the Executive Department of the State of New York; ARTHUR COOPERMAN, Individually and in his capacity as Chairman of the New York State Workmen's Compensation Board; and the NEW YORK STATE WORKMEN'S COMPENSATION BOARD,

Defendants-Appellants-Cross-Appellees.

Notice of Appeal—Delta Air Lines, Inc.

NOTICE IS HEREBY GIVEN that Defendants-Appellants WERNER H. KRAMARSKY, ANN THACHER ANDERSON and the NEW YORK STATE DIVISION OF HUMAN RIGHTS hereby appeal to the Supreme Court of the United States from the final judgment of this Court entered in this action on November 24, 1981 insofar as it holds Section 296 of the Human Rights Law, N.Y. Executive Law Art. 15 (McKinney 1972 & Supp. 1980-81) to be preempted by the Employee Retirement Income Security Act of 1974, P.L. 93-406, 29 U.S.C. §§ 1001 *et seq.*

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

ANN THACHER ANDERSON
General Counsel
State Division of Human Rights
Attorney for Defendants-Appellants
2 World Trade Center
New York, N.Y. 10047

To:

KILPATRICK & CODY
Attorneys for Plaintiffs-Appellees-Cross-Appellants
3100 Equitable Building
100 Peachtree Street
Atlanta, Georgia 30043

HON. ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Defendants-Cross-Appellees
2 World Trade Center
New York, N.Y. 10047

Notice of Appeal — Delta Air Lines, Inc.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

80-7179

DELTA AIR LINES, INC., ALLEGHENY AIRLINES, INC., NATIONAL AIRLINES, INC., PIEDMONT AVIATION, INC., BRANIFF AIRWAYS, INC., NORTH CENTRAL AIRLINES, INC., SOUTHERN AIRWAYS, INC., EASTERN AIR LINES, INC., NORTHWEST AIRLINES, INC., TRANSWORLD AIRLINES, INC., OZARK AIR LINES, INC., AMERICAN AIRLINES, INC., and UNITED AIR LINES, INC.,

Plaintiffs-Appellees-Cross-Appellants,

v.

WERNER H. KRAMARSKY, Individually and in his capacity as Commissioner of the New York State Division of Human Rights; ANN THACHER ANDERSON, Individually and in her capacity as General Counsel of the New York State Division of Human Rights; the NEW YORK STATE DIVISION OF HUMAN RIGHTS, an agency of the Executive Department of the State of New York; WILLIAM B. KROEGER, Individually and in his capacity as Chairman of the New York State Workers' Compensation Board; and the NEW YORK STATE WORKERS' COMPENSATION BOARD,

Defendants-Appellants-Cross-Appellees.

NOTICE IS HEREBY GIVEN that Defendants-Cross-Appellees WILLIAM B. KROEGER* and the NEW YORK STATE WORKERS' COMPENSATION BOARD hereby appeal to the Supreme Court of the United States from the final judgment of this Court entered on November 24, 1981 insofar as it held that the Employee Retirement Income Security Act of 1974,

* Pursuant to Fed. R. App. P. 43(c) and Rule 40.3, Rules of the Supreme Court, William B. Kroeger, the current Chairman of the Workers' Compensation Board, has been substituted for Arthur Cooperman as a defendant-cross-appellee.

P.L. 93-406, 29 U.S.C. §§ 1001 *et seq.* preempts Section 205 of the Disability Benefits Law, New York Workers' Compensation Law Art. 9 (McKinney 1965 & Supp. 1981-82).

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

ROBERT ABRAMS
Attorney General of the
State of New York
Two World Trade Center
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(212) 488-2138

By: /s/ DEBORAH BACHRACH

SHIRLEY ADELSON SIEGEL
Solicitor General

DEBORAH BACHRACH
DANIEL BERGER
Assistant Attorneys General

To:

KILPATRICK & CODY
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Atlanta, Georgia 30043
Attorneys for Plaintiffs-Appellees-Cross-Appellants

Attorneys for
Defendants-Cross-Appellees

ANN THACHER ANDERSON
General Counsel, New York State
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New York, New York 10047
Attorney for Defendants-Appellants

CONSTANCE L. DUPRE
CAROL CRESSWELL MOSCHANDREAS
Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20506
Attorneys for *Amicus Curiae*

Notice of Appeal—Delta Air Lines, Inc.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

BARBARA SIMMONS being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Defendants-Cross-Appellees Workers' Compensation Board and William Kroeger herein. On the 4th day of February, 1982, she served the annexed Notice of Appeal upon the following named persons:

Kilpatrick & Cody
3100 Equitable Building
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Atlanta, Georgia 30043
Attorneys for
Plaintiffs-Appellees-
Cross-Appellants

Constance L. Dupre
Carol Cresswell Moschandreas
Equal Employment
Opportunity Commission
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Washington, D.C. 20506
Attorneys for *Amicus Curiae*

Ann Thacher Anderson
General Counsel, New York State
Division of Human Rights
Two World Trade Center
New York, New York 10047
Attorney for Defendants-Appellants

attorneys of record in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York, 10047, directed to said attorneys at the addresses designated by them for that purpose.

/s/ BARBARA SIMMONS

Sworn to before me this
4th day of February, 1982

/s/ DANIEL BERGER

Assistant Attorney General
of the State of New York

Notice of Appeal — Burroughs Corporation

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 80-7127

BURROUGHS CORPORATION,

Plaintiff-Appellee,

v.

WERNER H. KRAMARSKY, As Commissioner of the New York State Division of Human Rights,

Defendant-Appellant,

NOTICE IS HEREBY GIVEN that Defendant-Appellant WERNER H. KRAMARSKY as Commissioner of the New York State Division of Human Rights, hereby appeals to the Supreme Court of the United States from the final judgment of this Court entered in this action on November 24, 1981 insofar as it holds Section 296 of the Human Rights Law, N.Y. Executive Law Art. 15 (McKinney 1972 & Supp. 1980-81) to be preempted by the Employee Retirement

Income Security Act of 1974, P.L. 93-406, 29 U.S.C. §§ 1001 *et seq.*

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Ann Thacher Anderson
General Counsel
State Division of Human Rights
Attorney for Defendant-Appellant
2 World Trade Center
New York, N.Y. 10047

To:

Nixon, Hargrave, Devans & Doyle
Attorneys for Plaintiff-Appellee
Lincoln First Tower
Rochester, N.Y. 14603

Hon. Robert Abrams
Attorney General of the State of New York
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New York, N.Y. 10047

Notice of Appeal — Metropolitan Life Insurance Company

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 80-7185

METROPOLITAN LIFE INSURANCE COMPANY,

Plaintiff-Appellee,

v.

WERNER H. KRAMARSKY, As Commissioner of the New York State Division of Human Rights, The NEW YORK STATE DIVISION OF HUMAN RIGHTS, and the NEW YORK STATE HUMAN RIGHTS APPEAL BOARD,

Defendants-Appellants.

NOTICE IS HEREBY GIVEN that Defendants-Appellants WERNER H. KRAMARSKY, as Commissioner of the New York State Division of Human Rights, and the NEW YORK STATE DIVISION OF HUMAN RIGHTS hereby appeal to the Supreme Court of the United States from the final judgment of this Court entered in this action on November 24, 1981 insofar as it holds Section 296 of the Human Rights Law, N.Y. Executive Law Art. 15 (McKinney 1972 & Supp. 1980-81)

to be preempted by the Employee Retirement Income Security Act of 1974, P.L. 93-406, 29 U.S.C. §§ 1001 *et seq.*

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

ANN THACHER ANDERSON
General Counsel
Attorney for Defendants-Appellants
2 World Trade Center
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To:

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STATE HUMAN RIGHTS APPEAL BOARD
2 World Trade Center
25th Floor
New York, N.Y. 10047

Notice of Motion for Stay Pending Appeal

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Numbers

80-7127, 80-7179, 80-7185

BURROUGHS CORP.

v.

KRAMARSKY

DELTA AIR LINES, INC. et al.

v.

KRAMARSKY

METROPOLITAN LIFE INS. CO.

v.

KRAMARSKY

MOTION BY: *(Name and tel. no. of attorney in charge)*

ANN THACHER ANDERSON
212-488-7650

Notice of Motion for Stay Pending Appeal

Has opposing counsel consented? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)

Requested return date:
(See Second Circuit Rule 27(b))

Date of argument of appeal, if scheduled:

Judge or agency whose order is being appealed:
Kearse, Moore, Tenney

Opposing Counsel: *(Name and tel. no of attorney in charge)*

William E. McKnight*
Dean Booth**
Jeffrey Mishkin***

Emergency Motions, Motions for Stays & Injunctions Pending Appeal

Has request for relief been made below?
(See F.R.A.P. Rule 8.) ☐ Yes ☒ No

Would expedited appeal eliminate need for this motion?
☐ Yes ☒ No

If no, explain why not:

Stay is necessary to preserve the status quo and prevent irreparable injury to persons invoking HRL § 296.

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* Tel. (716) 546-8000
** Tel. (404) 572-6500
*** Tel. (212) 909-7070

Notice of Motion for Stay Pending Appeal

Brief statement of the relief requested: Stay or recall of mandates to District Court; stay pending review by the Supreme Court of the United States of all declaratory relief granted or affirmed by the decision of this Court herein dated November 24, 1981. See 28 U.S.C. §§ 1651, 2202; Rule 44 of Rev. Rules of Supreme Court of United States.

Previous requests for similar relief and disposition: None.

Statement of the issue(s) presented by this motion: Whether pending appeal pursuant to 28 U.S.C. § 1254(2) from judgment declaring State statute preempted by Federal statute, this Court may appropriately stay its mandates to the District Court and all declaratory relief granted or affirmed herein.

Brief statement of the facts *(with page references to the moving papers)*: On November 24, 1981 this Court on rehearing issued a judgment holding Section 296 of the Human Rights Law preempted by ERISA. Defendants-Appellants Kramarsky *et al.* have filed notices of appeal to the Supreme Court and ask for this stay pending determination of that appeal.

Summary of the argument *(with page references to the moving papers)*: Unless stayed pending review, the declaratory relief granted and affirmed by this Court will permit any person defending a complaint now pending or filed hereafter under the Human Rights Law to plead preemption by ERISA as a basis for enjoining proceedings on the complaint, including investigation and fact-finding. The requested stay will maintain the status quo; will avoid irreparable injury to persons invoking or relying on the

Notice of Motion for Stay Pending Appeal

Human Rights Law, and will avoid a multiplicity of litigation in the U.S. District Courts in New York.

12/14/81 — Date

/s/ Ann Thacher Anderson

Ann Thacher Anderson
Attorney for Kramarsky, et al.

ORDER

It Is Hereby Ordered that the motion be and it hereby is granted

/s/ Leonard P. Moore
Leonard P. Moore

/s/ Amalya L. Kearse
Amalya L. Kearse
Circuit Judges

/s/ Charles Tenney
Charles Tenney
District Judge

Notice of Motion for Stay Pending Appeal — Delta Air Lines, Inc.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Number

80-7179

DELTA AIR LINES, *et al.*,

Plaintiffs-Appellees-Cross-Appellants,

against

WERNER H. KRAMARSKY, etc., *et al.*,

Defendants-Appellants-Cross-Appellees.

MOTION BY: *(Name and tel. no. of attorney in charge)*
DEBORAH BACHRACH
(212) 488-7511

Has opposing counsel consented? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)

Notice of Motion for Stay Pending Appeal — Delta Air Lines, Inc.

Requested return date:
(See Second Circuit Rule 27(b))

Date of argument of appeal, if scheduled:

Judge or agency whose order is being appealed:
HON. MORRIS H. LASKER

OPPOSING COUNSEL: *(Name and tel. no. of attorney in charge)*
J. STANLEY HAWKINS (404) 572-6500

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below?
(See F.R.A.P. Rule 8.) ☐ Yes ☒ No

Would expedited appeal eliminate need for this motion?
☐ Yes ☒ No

If no, explain why not:

Appeal has been argued and decision issued. Defendants seek a stay pending filing notice of appeal.

Brief statement of relief requested: Stay of this Court's mandate of decision issued November 24, 1981, pursuant to F.R.A.P. 41(b) pending defendants' filing notice of appeal and jurisdictional statement in US Supreme Court.

Previous requests for similar relief and disposition: None.

Notice of Motion for Stay Pending Appeal — Delta Air Lines, Inc.

Statement of the issue(s) presented by this motion: Should the mandate of this Court be stayed pending defendants' filing a notice of appeal and jurisdictional statement in the United States Supreme Court.

Brief statement of the facts *(with page references to the moving papers)*: On November 24, 1981, this Court, having granted plaintiffs' petition for rehearing of its May 11, 1981 opinion, (1) vacated its prior opinion insofar as it held New York's Human Rights Law not preempted by ERISA and affirmed the District Courts' injunction prohibiting enforcement of that law regarding pregnancy benefits payable from December 20, 1976 through April 29, 1979; (2) reaffirmed its prior opinion that ERISA preempted New York's Disability Benefits Law for employees subject to ERISA; and (3) reaffirmed its remand to the district court for determination of whether plaintiffs' benefit plans are subject to ERISA. (Bachrach Aff. ¶¶ 3-7).

Summary of the argument *(with page references to the moving papers)*: The Workers' Compensation Board makes this motion to stay this Court's mandate in order to file a notice of appeal and jurisdictional statement in the Supreme Court (*Id.* 2). The stay is necessary to continue the protections of the DBL for New York workers and to avoid potentially unnecessary proceedings in the District Court while defendants appeal to Supreme Court (*Id.* ¶¶ 8-10). There is no immediate need for adjudication

of ERISA coverage of plaintiffs' plans by the district court, and plaintiffs will not be harmed by a stay.

Dec. 14, 1981 — /s/ Deborah Bachrach

Date

Deborah Bachrach
Attorney for Petitioner,
Cooperman & Workers'
Compensation Board

ORDER

It Is Hereby Ordered that the motion be and it hereby is granted

/s/ Leonard P. Moore

Leonard P. Moore

/s/ Amalya L. Kearse

Amalya L. Kearse
Circuit Judges

/s/ Charles Tenney

Charles Tenney
District Judge

Joint Appendix

Office - Supreme Court, U.S.
FILED
JUL 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1578

IN THE

Supreme Court of the United States

October Term, 1981

WERNER H. KRAMARSKY, *etc., et al.*,
Appellants,
v.
DELTA AIR LINES, INC., *et al.*,
Appellees.

WERNER H. KRAMARSKY, *etc.*,
Appellant,
v.
BURROUGHS CORPORATION,
Appellee.

WERNER H. KRAMARSKY, *etc., et al.*,
Appellants,
v.
METROPOLITAN LIFE INSURANCE COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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Appeal Docketed February 22, 1982.
Probable Jurisdiction Noted April 19, 1982.

TABLE OF CONTENTS

PAGE

Complaint, Dated July 11, 1977—*Delta Air Lines, Inc.* v. *Kramarsky* ..... JA 1

Defendants' Notice of Motion, Dated August 11, 1977—*Delta Air Lines, Inc.* v. *Kramarsky* ..... JA 23

Stipulation and Order Amending Complaint, Dated December 30, 1977—*Delta Air Lines, Inc.* v. *Kramarsky* ..... JA 25

Amended Complaint, Dated December 30, 1977—*Delta Air Lines, Inc.* v. *Kramarsky* ..... JA 28

Defendants' Answer, Dated March 17, 1980—*Delta Air Lines, Inc.* v. *Kramarsky* ..... JA 64

Order to Show Cause and Affidavit, Dated September 27, 1979—*Burroughs Corporation* v. *Kramarsky* ..... JA 71

Complaint, Dated October 11, 1979—*Burroughs Corporation* v. *Kramarsky* ..... JA 81

Complaint, Dated February 17, 1980—*Metropolitan Life Insurance Company* v. *Kramarsky* ..... JA 88

Affidavit of Joseph L. Rubsam, Dated February 13, 1980—*Metropolitan Life Insurance Company* v. *Kramarsky* ..... JA 97

Transcript of Proceedings, District Court, February 14, 1980—*Metropolitan Life Insurance Company* v. *Kramarsky* ..... JA 174

The following items are not reproduced in the Joint Appendix as they are set forth in the Appendix to the Jurisdictional Statement, at the following pages:

	PAGE OF APPENDIX TO THE JURISDICTIONAL STATEMENT
Opinion of Court of Appeals on Rehearing, November 24, 1981—Delta Air Lines, Inc.	A1
Opinion of Court of Appeals on Rehearing, November 24, 1981—Burroughs Corporation	A13
Opinion of Court of Appeals on Rehearing, November 24, 1981—Metropolitan Life Insurance Company	A15
Order of Court of Appeals Granting Rehearing—Delta Air Lines, Inc.	A17
Order of Court of Appeals Granting Rehearing—Burroughs Corporation	A19
Order of Court of Appeals Granting Rehearing—Metropolitan Life Insurance Company	A21
Opinion of the Court of Appeals, May 11, 1981—Delta Air Lines, Inc.	A23
Opinion of the Court of Appeals, May 11, 1981—Burroughs Corporation	A67
Opinion of the Court of Appeals, May 11, 1981—Metropolitan Life Insurance Company	A70
Order and Judgment of the District Court, March 19, 1980—Delta Air Lines, Inc.	A73
Opinion of the District Court, January 28, 1980—Delta Air Lines, Inc.	A77
Correcting Memorandum, Judge Lasker, Dated February 4, 1980	A102

PAGE OF APPENDIX TO THE JURISDICTIONAL STATEMENT

Judgment of the District Court, January 14, 1980—Burroughs Corporation A103

Stipulation, Dated January 11, 1980, Burroughs Corporation A105

Decision and Order of the District Court, November 14, 1979—Burroughs Corporation A107

Order of the District Court, February 14, 1980—Metropolitan Life Insurance Company A118

Notice of Appeal—Delta Air Lines, Inc. A121

Notice of Appeal—Delta Air Lines, Inc. A123

Notice of Appeal—Burroughs Corporation A126

Notice of Appeal—Metropolitan Life Insurance Company A128

Notice of Motion for Stay Pending Appeal A130

Notice of Motion for Stay Pending Appeal—Delta Air Lines, Inc. A134

Complaint, Dated July 11, 1977— *Delta Air Lines, Inc.* v. *Kramarsky*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ.

DELTA AIR LINES, INC., ALLEGHENY AIRLINES, INC., NATIONAL AIRLINES, INC., PIEDMONT AVIATION, INC., BRANIFF AIRWAYS, INC., NORTH CENTRAL AIRLINES, INC., SOUTHERN AIRWAYS, INC., EASTERN AIR LINES, INC., NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., OZARK AIR LINES, INC., AMERICAN AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., and UNITED AIR LINES, INC.,

Plaintiffs,

against

WERNER H. KRAMARSKY, individually and in his capacity as Commissioner of the New York State Division of Human Rights; BEVERLY GROSS, individually and in her capacity as General Counsel of the New York State Division of Human Rights; and the NEW YORK STATE DIVISION OF HUMAN RIGHTS, an agency of the Executive Department of the State of New York,

Defendants.

Plaintiffs, for their complaint, aver:

1. The jurisdiction of this Court over this action is invoked under Title 28, United States Code, §§ 1331, 1337 and 1343(3). The value of the matter in controversy exceeds, exclusive of interest and costs, the sum of Ten

Thousand Dollars. The action arises under the Constitution and laws of the United States and particularly under:

(a) U.S. Const., art. I, § 8, cl. 3;

(b) U.S. Const., art. VI, cl. 2;

(c) U.S. Const., amend. XIV;

(d) 42 U.S.C. § 1983;

(e) Equal Pay Act of 1963, 29 U.S.C. § 206(d);

(f) Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*;

(g) Executive Order 11246, 3 C.F.R. 169 (1974);

(h) Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* ("ERISA");

(i) Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* ("RLA");

2. This is a proceeding for a preliminary and permanent injunction to enjoin the Defendants from enforcing against the Plaintiffs certain laws of the State of New York in a manner that conflicts with the Constitution and laws of the United States, as hereinafter more fully appears. This is also an action for a declaratory judgment pursuant to 28 U.S.C. § 2201, for the purpose of determining an actual controversy between the parties, as hereinafter more fully appears.

3. Plaintiffs Delta Air Lines, Inc., Allegheny Airlines, Inc., National Airlines, Inc., Piedmont Aviation, Inc., Braniff Airways, Inc., North Central Airlines, Inc., Southern Airways, Inc., Eastern Air Lines, Inc., North-

WEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., OZARK AIR LINES, INC., AMERICAN AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., UNITED AIR LINES, INC. are corporations duly organized and authorized to engage in the commercial air transportation business and have, at all times relevant hereto, been duly licensed by appropriate federal agencies to engage in the transportation by air of passengers and cargo within and among the several states of the United States and abroad.

4. Defendant, NEW YORK STATE DIVISION OF HUMAN RIGHTS (hereinafter the "Division"), is an administrative agency of the Executive Department of the State of New York, existing under and by virtue of an act of the State of New York entitled "Human Rights Law," New York Executive Law §§ 290 *et seq.*, and is specifically charged with the administration and enforcement of said act.

5. Defendant, WERNER H. KRAMARSKY, is the duly appointed Commissioner of the Defendant Division, and is specifically granted the authority, individually or through his duly authorized officers or employees, to prosecute or hear complaints regarding alleged violations of the Human Rights Law.

6. Defendant, BEVERLY GROSS, is an officer or employee of the Commissioner of the Defendant Division and is duly authorized to hear or prosecute complaints against the Plaintiffs, as hereinafter more fully appears.

Complaint, Delta Air Lines

INTRODUCTORY FACTUAL ALLEGATIONS

7. Plaintiffs maintain various employee benefit plans, including sickness and accident disability plans, sick leave plans, and medical benefit plans, through which payments are made to Plaintiffs' employees who suffer from sicknesses or accidents falling within the coverage of the various plans.

8. Plaintiffs' employee benefit plans are funded and administered in several different ways, including:

(a) In some plans, the employer contributes a single premium to purchase insurance coverage from private insurance carriers for its employees;

(b) In some plans, the employer itself fully funds and administers the plan, often by establishing a trust fund;

(c) In some plans, the employer provides all funds but retains an insurance company or other institution to administer the plans;

(d) In some plans, the employer and the employees make joint contributions to the maintenance of a fund or the purchase of an insurance plan; and

(e) In some plans, the employees pay for all of the coverage.

9. In the employee benefit plans described in paragraphs seven and eight, Plaintiffs do not include complete coverage for disabilities or costs associated with pregnancies.

10. The Defendant Division has issued "guidelines" which declare that an employer's policy of excluding complete pregnancy coverage from an employee benefit plan as described in paragraphs seven and eight is illegal under the New York State Human Rights Law.

11. The courts of the State of New York have issued opinions declaring that a policy of not including complete pregnancy coverage in employee benefit plans is illegal under the New York Human Rights Law.

12. The Defendant Division has commenced, or has threatened to commence, or is likely to commence administrative cases against Plaintiffs because of Plaintiffs' policies of not including complete pregnancy coverage in their benefit plans.

13. By means of administrative cases and by other means, the Defendant Division and the individual Defendants are seeking to compel Plaintiffs to include complete pregnancy coverage in their employee benefit plans.

COUNT I: DECLARATORY RELIEF ON GROUNDS THAT DEFENDANTS' ATTEMPTED REGULATION OF PLAINTIFFS' COMPENSATION POLICIES IS PREEMPTED BY "ERISA"

Plaintiffs repeat the averments of paragraphs seven through thirteen hereof.

14. Plaintiffs, as employers subject to the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* ("RLA"), are covered employers under sections 3(11), 3(12), and 4 of the

Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* ("ERISA"), and, therefore, Plaintiffs' employee benefit plans are governed by ERISA. *Id.*, § 1002(1).

15. Pursuant to Section 514 of ERISA, 29 U.S.C. § 1144, ERISA preempts and "supersedes any and all State laws," including "laws, decisions, rules, regulations, or other State action having the effect of law," insofar as such laws "may now or hereafter relate to any employee benefit plan" subject to the Act, whether they relate "directly or indirectly" to "the terms and conditions of employee benefit plans covered by [ERISA]."

16. Plaintiffs' employee benefit plans are covered by ERISA.

17. Defendants' attempts to force Plaintiffs to include pregnancy coverage in their employee benefit plans clearly "relates to" Plaintiffs' employee benefit plans.

18. Defendants' "guidelines," judicial decisions, and threatened or actual administrative actions against Plaintiffs, as more specifically set out in paragraphs ten through thirteen, which declare Plaintiffs' failure to include complete pregnancy coverage to be unlawful under New York State law are superseded and preempted by ERISA and the Supremacy Clause (art. VI, cl. 2) of the United States Constitution.

19. The actions of Defendants will cause, under color of New York law, Plaintiffs to be subjected to the depriva-

tion of rights secured by the Constitution of the United States, including the Supremacy Clause (art. VI, cl. 2), and by Acts of Congress providing for the equal rights of citizens or of persons within the jurisdiction of the United States. This deprivation is illegal under 42 U.S.C. § 1983.

WHEREFORE, Plaintiffs respectfully pray that the Court grant Plaintiffs a judgment declaring and adjudging as follows:

(a) that Plaintiffs' employee benefit plans are currently consistent with and governed by ERISA;

(b) that the State of New York and the Defendants lack jurisdiction to enforce laws or regulations governing Plaintiffs' benefit plans because of § 514 of ERISA;

(c) that the laws, rules, regulations and guidelines of the State of New York and of the Defendants are unlawful and void under the Supremacy Clause (art. VI, cl. 2) of the United States Constitution and superseded and preempted by ERISA insofar as they require Plaintiffs to include complete pregnancy coverage in their benefit plans;

(d) that Defendants' attempts to regulate under color of state law Plaintiffs' benefit plans in a manner contrary to federal law and the Supremacy Clause violates Plaintiffs' rights under 42 U.S.C. § 1983;

(e) that Plaintiffs are entitled to reasonable attorney's fees under the Civil Rights Attorneys' Fees Awards Act of 1976, P.L. 94-559, and under other applicable law; and

(f) that Plaintiffs be allowed their costs herein, including such other and further relief as the Court deems appropriate.

COUNT II: DECLARATORY RELIEF ON GROUNDS THAT COMPENSATION POLICY OF THE PLAINTIFF IS REQUIRED BY FEDERAL LAW

Plaintiffs repeat the averments of paragraphs seven through nineteen hereof.

20. Title VII of the Civil Rights Act of 1964 and the Equal Pay Act require that male and female employees be compenstated equally for equal work.

21. As federal contractors, Plaintiffs are required under Executive Order 11246 to pay their male and female employees equal compensation for equal work.

22. There are two components of compensation:

(1) "primary compensation" in the form of wages and salaries; and

(2) "supplementary compensation" which consists of payments made by the employer to secure the availability of direct financial benefits payable to employees including payments made under various employee benefit plans.

23. Plaintiffs provide equal "primary compensation" in the form of wages and salaries for equal work to their male and female employees.

24. Plaintiffs' "primary compensation" to their employees is not currently being challenged by the Defendants.

25. Plaintiffs provide "supplementary compensation" that is fairly equivalent in value in terms of dollar benefits paid per salary dollar to their male and female employees.

26. More particularly Plaintiffs provide employee benefit plans as described in paragraphs seven and eight which are farily equivalent in value in terms of dollar benefits paid per salary dollar to their male and female employees.

27. Plaintiffs' employee benefit plans are currently being challenged by the Defendants, as is more particularly set forth in paragraphs ten through thirteen.

28. Plaintiffs' male and female employees are covered equally under the employee benefit plans for all disabilities which arise out of sickness or injury.

29. Pregnancy is neither a sickness nor an injury.

30. Complete pregnancy coverage is not included in the employee benefit plans that are set forth in paragraphs seven and eight.

31. The inclusion of complete pregnancy coverage in Plaintiffs' employee benefit plans would cause a substantial increase in the dollar value of benefits paid to women.

32. The inclusion of complete pregnancy coverage in Plaintiffs' employee benefit plans would cause no increase in the dollar value of benefits paid to men.

33. The inclusion of complete pregnancy coverage in Plaintiffs' employee benefit plans would result in Plaintiffs' male and female employees receiving unequal compensation for equal work, with females receiving greater compensation than their male counterparts.

34. For those employee benefit plans that are partially or totally funded by employee contributions, the inclusion of complete pregnancy coverage will require male employees to pay additional money for benefits that they cannot receive.

35. The Defendants are attempting to force Plaintiffs to include complete pregnancy coverage in their employee benefit plans in the manner set forth in paragraphs ten through thirteen.

36. If Plaintiffs are forced to include complete pregnancy coverage in their employee benefit plans, Plaintiffs will be in violation of Title VII.

37. If Plaintiffs are forced to include complete pregnancy coverage in their employee benefit plans, Plaintiffs will be in violation of the Equal Pay Act.

38. If Plaintiffs are forced to include complete pregnancy coverage in their employee benefit plans, Plaintiffs will be violation of Executive Order 11246.

39. New York law is being used by Defendants in this situation as a "state protective law" in order to give women a discriminatory advantage over men.

40. Because New York law in this situation conflicts with federal law, New York law is preempted and its enforcement in derogation of federal law is illegal under the United States Constitution.

41. The actions of Defendants will cause, under color of New York law, Plaintiffs to be subjected to the deprivation of rights secured by the Constitution of the United States, including the Supremacy Clause (Art. VI, cl. 2), and by Acts of Congress providing for the equal rights of citizens or of persons within the jurisdiction of the United States. This deprivation is illegal under 42 U.S.C. § 1983.

WHEREFORE, Plaintiffs respectfully pray that the Court grant Plaintiffs a judgment declaring and adjudging as follows:

(a) that Plaintiffs' employee benefit plans are currently consistent with and required by federal laws relating to equal employment opportunity;

(b) that the State of New York and the Defendants lack jurisdiction to enforce laws where such enforcement would contravene federal laws relating to equal employment opportunity;

(c) that the laws, rules, regulations and guidelines of the State of New York and of the Defendants are unlawful

and void under the Supremacy Clause (art. VI, cl. 2) of the United States Constitution as in conflict with federal law, including Title VII, the Equal Pay Act, and Executive Order 11246, insofar as they require Plaintiffs to include complete pregnancy coverage in their employee benefit plans;

(d) That Defendants' attempts to regulate under color of state law Plaintiffs' benefit plans in a manner contrary to federal law and the Supremacy Clause violates Plaintiffs' rights under 42 U.S.C. § 1983;

(e) that Plaintiffs are entitled to reasonable attorney's fees under the Civil Rights Attorneys' Fees Awards Act of 1976, P.L. 94-559, and under other applicable law; and

(f) that Plaintiffs be allowed their costs herein, including such other and further relief as the Court deems appropriate.

COUNT III: DECLARATORY RELIEF ON GROUNDS THAT DEFENDANTS' ATTEMPTED REGULATION OF PLAINTIFFS' COMPENSATION POLICIES IS PREEMPTED BY THE "RLA"

Plaintiffs repeat the averments of paragraphs seven through forty-one hereof.

42. Plaintiffs are subject to the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* ("RLA"). 45 U.S.C. § 181.

43. The RLA requires Plaintiffs to bargain with their organized employees concerning, *inter alia*, employee benefit plans, and regulates the manner in which Plaintiffs and

their employees may bargain over this mandatory subject of bargaining.

44. Because Plaintiffs are interstate and international carriers, the RLA requires Plaintiffs to bargain for agreements with their organized employees which, *a fortiori*, become interstate collective bargaining agreements.

45. Pursuant to the RLA, Plaintiffs and their employees have negotiated interstate collective bargaining agreements which provide, as relevant here, that complete pregnancy coverage will not be included in the employee benefit plans.

46. Pursuant to the RLA, "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except [by prescribed handling by the Mediation Board]." 45 U.S.C. § 152, Seventh.

47. Plaintiffs' employee benefit plans, which exclude pregnancy as a covered "disability" under the plans, constitute "rates of pay, rules, or working conditions" as set out in 45 U.S.C. § 152, Seventh.

48. Defendants are attempting to make illegal, alter, and vitiate the employee benefit plans embodied in Plaintiffs' collective bargaining agreements with their employees, all as more specifically set out in paragraphs ten through thirteen of this Complaint.

49. Plaintiffs are in a position of jeopardy and faced with risk and legal exposure since they cannot meet their obligations under the RLA and under Defendant's guidelines and rulings as set out in paragraphs ten through thirteen of this Complaint.

50. The aforementioned attempts by Defendants to change the terms of Plaintiffs' interstate collective bargaining agreements entered into pursuant to the RLA are preempted by the RLA and are illegal under the Supremacy Clause of the United States Constitution.

51. The actions of Defendants will cause, under color of New York law, Plaintiffs to be subjected to the deprivation of rights secured by the Constitution of the United States, including the Supremacy Clause (art. VI, cl. 2), and by Acts of Congress providing for the equal rights of citizens or of persons within the jurisdiction of the United States. This deprivation is illegal under 42 U.S.C. § 1983.

WHEREFORE, Plaintiffs respectfully pray that the Court grant Plaintiffs a judgment declaring and adjudging as follows:

(a) that Plaintiffs' employee benefit plans which are the result of collective bargaining with their employees are required by and governed by the RLA;

(b) that the State of New York and the Defendants lack jurisdiction to enforce laws where such enforcement would alter the terms of such collective bargaining agreement entered into pursuant to the RLA;

(c) that the laws, rules, regulations and guidelines of the State of New York and of the Defendants are unlawful and void under the Supremacy Clause (art. VI, cl. 2) of the United States Constitution as in conflict with federal law insofar as they require Plaintiffs to include pregnancy coverage in their employee benefit plans;

(d) that Defendants' attempts to regulate under color of state law Plaintiffs' benefit plans in a manner contrary to federal law and the Supremacy Clause violates Plaintiffs' rights under 42 U.S.C. § 1983;

(e) that Plaintiffs are entitled to reasonable attorney's fees under the Civil Rights Attorneys' Fees Awards Act of 1976, P.L. 94-559, and under other applicable law; and

(f) that Plaintiffs be allowed their costs herein, including such other and further relief as the Court deems appropriate.

COUNT IV: DECLARATORY RELIEF ON GROUNDS THAT EXTRA-TERRITORIAL IMPACT OF DEFENDANTS' ATTEMPTED REGULATION OF PLAINTIFFS' EMPLOYEE BENEFIT PLANS IS INVALID UNDER THE DUE PROCESS CLAUSE AND COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

Plaintiffs repeat the averments of paragraphs seven through fifty-one hereof.

52. The development of Plaintiffs' compensation policy is an area of interstate commerce which, by its very nature, and under the mandates of the RLA, requires national uniformity.

53. Not only are Defendants attempting to alter that policy in the State of New York, as set out in paragraphs ten through thirteen hereto, but also § 298-a of the New York Human Rights Law (under which Defendants presume to act) provides that Defendants' aforementioned attempts shall have extra-territorial impact.

54. Such extra-territorial impact as prescribed by § 298-a of the New York Human Rights Law is violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. U.S. Const. amend. XIV.

55. Moreover, to allow New York State, through Defendants, and thus, *a fortiori*, other states to so regulate Plaintiffs' benefit plans subjects Plaintiffs to the possibility of conflicting State regulation.

56. The potential for conflicting state regulation in this area together with the conflicts which already exist create an intolerable burden on interstate commerce in an area which, by its nature, and under the RLA, requires uniformity of regulation. Defendants' attempted regulation of Plaintiffs' benefit plans is therefore unconstitutional under the Commerce Clause of the United States Constitution. Art. I § 8, cl. 3.

57. The actions of Defendants and the effects of § 298-a of the New York Human Rights Law will cause, under color of New York law, Plaintiffs to be subjected to the deprivation of rights secured by the Constitution of the United States, including the Commerce Clause and the Fourteenth Amendment, and by Acts of Congress providing for the equal rights of citizens or of persons within the

jurisdiction of the United States. This deprivation is illegal under 42 U.S.C. § 1983.

WHEREFORE, Plaintiffs respectfully pray that this Court grant Plaintiffs a judgment declaring and adjudging as follows:

(a) that Plaintiffs' benefit plans are currently consistent with and governed by federal law;

(b) that the State of New York and the Defendants lack jurisdiction to enforce laws where such laws would have an extra-territorial impact under § 298-a and create an intolerable burden on interstate commerce;

(c) that the laws, rules, regulations and guidelines of the State of New York and of the Defendants, and in particular § 298-a of the New York Human Rights Law, are unlawful and void under the Due Process Clause (amend. XIV) and Commerce Clause (art. I, § 8, cl. 3) of the United States Constitution as an intolerable burden on interstate comerce insofar as they require Plaintiffs to include pregnancy coverage in their benefit plans;

(d) that Defendants' attempts to regulate under color of state law Plaintiffs' benefit plans outside of the State of New York in a manner contrary to federal law violates Plaintiffs' rights under 42 U.S.C. § 1983;

(e) that Plaintiffs are entitled to reasonable attorney's fees under the Civil Rights Attorneys' Fees Awards Act of 1976, P.L. 94-559, and under other applicable law; and

(f) that Plaintiffs be allowed their costs herein and such other and further relief as the Court deems appropriate.

COUNT V: INJUNCTIVE RELIEF ON GROUNDS THAT PLAINTIFFS' EMPLOYEE BENEFIT PLANS ARE REQUIRED BY FEDERAL LAW AND DEFENDANTS' ATTEMPT TO FORCE PLAINTIFFS TO INCLUDE PREGNANCY COVERAGE IS VOID UNDER, AND PREEMPTED BY, FEDERAL LAW

Plaintiffs repeat the averments of paragraphs seven through fifty-seven.

58. If the Defendants are permitted to continue the activities specified in this Complaint in an attempt to force Plaintiffs to include pregnancy coverage in their employee benefit plans, Plaintiffs will suffer irreparable and immediate harm for which Plaintiffs are without a plain, adequate, or speedy remedy at law. Plaintiffs have no effective remedies under state law and this suit for declaratory and injunctive relief is Plaintiffs' only means for securing relief.

WHEREFORE, the Plaintiffs respectfully pray that this Court:

(a) grant a preliminary and permanent injunction, enjoining Defendants, their agents, successors and employees from compelling or attempting to compel, or in any way causing Plaintiffs to abandon their current benefit policies;

(b) grant a preliminary and permanent injunction, enjoining the Defendants, their agents, successors and employees from prosecuting the Plaintiffs in any administrative cases because of Plaintiffs' employee benefit plans;

(c) rule that Plaintiffs are entitled to reasonable attorney's fees under the Civil Rights Attorneys' Fees Awards Act of 1976, P.L. 94-559, and under other applicable law; and

(d) allow Plaintiffs their costs herein, including such other and further relief as the Court deems appropriate.

COUNT VI: DECLARATORY RELIEF ON GROUNDS OF DEPRIVATION OF EQUAL RIGHTS

Plaintiffs repeat the averments of paragraphs seven through fifty-eight hereof.

59. Plaintiffs' current and future male employees have the right, under Title VII of the 1964 Civil Rights Act, under the Equal Pay Act, and under Executive Order 11246, to be compensated on an equal basis with female employees for equal work.

60. The actions of Defendants, as set forth in paragraphs seven through fifty-eight, which are here restated and incorporated by reference herein, will cause Plaintiffs' current and future male employees to be subjected to the deprivation of their right not to be discriminated against because of their sex in matters pertaining to compensation.

61. The actions of Defendants will cause, under color of New York law, citizens or persons within the jurisdiction of the United States to be subjected to the deprivation of rights secured by the Constitution of the United States and by Acts of Congress providing for the equal rights of such persons. This deprivation is illegal under 42 U.S.C. § 1983.

62. The actions of Defendants will cause Plaintiffs direct and substantial injury by requiring Plaintiffs to pay the costs of substantial increases in "supplementary compensation" to its female employees.

63. The actions of Defendants will cause Plaintiffs direct and substantial injury by exposing Plaintiffs to liability under Title VII of the 1964 Civil Rights Act and the Equal Pay Act and to sanctions under Executive Order 11246 and particularly by forcing Plaintiffs under color of state law to pay "supplementary compensation" to their female employees which will be substantially greater in value than the "supplementary compensation" paid to Plaintiffs' male employees.

64. Plaintiffs bring this action to prevent these injuries to themselves and to redress the threatened deprivation of the rights of their current and future male employees in a manner in which these employees have little chance of effectively protecting those rights on their own behalf.

WHEREFORE, Plaintiffs respectfully request this Court to grant Plaintiffs a judgment declaring and adjudging as follows:

(a) that Plaintiffs' male employees, under their federally-established right, are currently receiving compensation under policies which do not discriminate against them because of their sex;

(b) that the addition of pregnancy coverage to Plaintiffs' employee benefit plans would tend to force Plaintiffs to deprive Plaintiffs' male employees of their federal right to equal compensation;

(c) that Plaintiffs are entitled to reasonable attorney's fees under the Civil Rights Attorneys' Fees Awards Act of 1976, P.L. 94-559, and under other applicable law; and

(d) that Plaintiff be allowed their costs herein, including such other and further relief as the Court deems appropriate.

COUNT VII: INJUNCTIVE RELIEF ON GROUNDS OF DEPRIVATION OF EQUAL RIGHTS

Plaintiffs repeat the averments of paragraphs seven through sixty-four.

65. If the Defendants are permitted to enforce the New York State Human Rights Law against the Plaintiffs in the manner specified in this Complaint, Plaintiffs and their male employees will suffer irreparable and immediate harm for which Plaintiffs and their male employees are without a plain, adequate, or speedy remedy at law. Plaintiffs and their male employees have no effective remedies under state law, and this suit for declaratory and injunctive relief is their only means for securing relief.

WHEREFORE, the Plaintiffs respectfully pray that this Court:

(a) grant a preliminary and permanent injunction, enjoining the Defendants, their agents, successors and employees from compelling or attempting to compel, or in any way causing Plaintiffs to abandon their current benefit policies;

(b) grant a preliminary and permanent injunction, enjoining the Defendants, their agents, successors and em-

ployees from prosecuting the Plaintiffs in any administrative cases because of Plaintiffs' employee benefit plans;

(c) that Plaintiffs are entitled to reasonable attorney's fees under the Civil Rights Attorneys' Fees Awards Act of 1976, P.L. 94-559, and under other applicable law; and

(d) allow Plaintiffs their costs herein, including such other and further relief as the Court deems appropriate.

Respectfully submitted,

/s/ DEAN BOOTH
Dean Booth

/s/ J. STANLEY HAWKINS
J. Stanley Hawkins

/s/ ROBERT L. MOTE
Robert L. Mote

/s/ OTTO F. FEIL, III
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Defendants' Notice of Motion, Dated August 11, 1977—*Delta Air Lines, Inc.* v. *Kramarsky*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 3358

DELTA AIR LINES, INC., ALLEGHENY AIRLINES, INC., NATIONAL AIRLINES, INC., PIEDMONT AVIATION, INC., BRANIFF AIRWAYS, INC., NORTH CENTRAL AIRLINES, INC., SOUTHERN AIRWAYS, INC., EASTERN AIR LINES, INC., NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., OZARK AIR LINES, INC., AMERICAN AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., and UNITED AIR LINES, INC.,

Plaintiffs,

against

WERNER H. KRAMARSKY, individually and in his capacity as Commissioner of the New York State Division of Human Rights; BEVERLY GROSS, individually and in her capacity as General Counsel of the New York State Division of Human Rights; and the NEW YORK STATE DIVISION OF HUMAN RIGHTS, an agency of the Executive Department of the State of New York,

Defendants.

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of ANN THACHER ANDERSON, Senior Attorney, State Division of Human Rights, and upon all the proceedings previously had herein, the undersigned will move this Court at a term

for motions to be held before the Hon. Morris E. Lasker in Room 1903, United States Court House, Foley Square, New York, N. Y., on the 9th day of September, 1977, at 9:30 in the forenoon, or as soon thereafter as counsel can be heard, for an order (1) dismissing the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that plaintiffs have failed to state a claim on which relief can be granted; (2) granting protective relief pursuant to Rule 26(c) with respect to plaintiffs' first request to defendants for admission of facts and plaintiffs' first interrogatories to defendants, pending disposition of this motion to dismiss; and (3) for such other and further relief as this Court may deem appropriate.

Dated: New York, New York
August 11, 1977

Yours, etc.

BEVERLY GROSS
General Counsel
State Division of Human Rights
Attorney for Defendants
Two World Trade Center
New York, N. Y. 10047

By _____

ANN THACHER ANDERSON
Senior Attorney

To:

Seward & Kissel, Esqs.
Attorneys for Plaintiffs
63 Wall Street
New York, N. Y. 10005

Stipulation and Order Amending Complaint, Dated December 30, 1977— *Delta Air Lines, Inc.* v. *Kramarsky*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 3358 (MEL)

DELTA AIR LINES, INC., ALLEGHENY AIRLINES, INC., NATIONAL AIRLINES, INC., PIEDMONT AVIATION, INC., BRANIFF AIRWAYS, INC., NORTH CENTRAL AIRLINES, INC., SOUTHERN AIRWAYS, INC., EASTERN AIR LINES, INC., NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., OZARK AIR LINES, INC., AMERICAN AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., and UNITED AIR LINES, INC.,

Plaintiffs,

against

WERNER H. KRAMARSKY, individually and in his capacity as Commissioner of the New York State Division of Human Rights; BEVERLY GROSS, individually and in her capacity as General Counsel of the New York State Division of Human Rights; and the NEW YORK STATE DIVISION OF HUMAN RIGHTS, an agency of the Executive Department of the State of New York,

Defendants.

IT IS HEREBY STIPULATED that pursuant to Rule 15 of the Federal Rules of Civil Procedure the complaint in this

action be and hereby is amended to add Arthur Cooperman and the New York State Workmen's Compensation Board as defendants and to set forth a new cause of action which did not exist at the time the original complaint was filed. A copy of the amended complaint is annexed as Exhibit A.

IT IS FURTHER STIPULATED that pursuant to Rule 25(d) of the Federal Rules of Civil Procedure Ann Thacher Anderson be and hereby is substituted as a defendant for Beverly Gross, Ann Thacher Anderson having succeeded Beverly Gross as General Counsel for defendant New York State Division of Human Rights in October 1977.

IT IS FURTHER STIPULATED that defendants Werner H. Kramarsky, Ann Thacher Anderson and the New York State Division of Human Rights shall answer or otherwise plead in response to the amended complaint within 20 days after service of the amended complaint on said defendants.

IT IS FURTHER STIPULATED that plaintiffs shall serve by mail notice of this action and a copy of the amended complaint on the Attorney General of the State of New York within 5 days of entry of this stipulation by the Court.

IT IS FURTHER STIPULATED that plaintiffs shall cause the amended complaint to be delivered to the marshal for service on Arthur Cooperman and the New York State

Stipulation and Order—Delta Air Lines

Workmen's Compensation Board within 5 days of entry of this stipulation by the Court.

New York, New York
December 30, 1977

SEWARD & KISSEL

By /s/ ANTHONY R. MANSFIELD
A Member of the Firm
Attorneys for Plaintiffs
63 Wall Street
New York, New York 10005
(212) 248-2800

/s/ ANN THACHER ANDERSON
ANN THACHER ANDERSON, ESQ.
General Counsel
State Division of Human Rights
Attorney for Defendants
Two World Trade Center
New York, New York 10047
(212) 488-6623

SO ORDERED: 1/4/78

/s/ MORRIS E. LASKER
U.S.D.J.

Amended Complaint, Dated December 30, 1977— *Delta Air Lines, Inc.* v. *Kramarsky*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 3358 (MEL)

DELTA AIR LINES, INC., ALLEGHENY AIRLINES, INC., NATIONAL AIRLINES, INC., PIEDMONT AVIATION, INC., BRANIFF AIRWAYS, INC., NORTH CENTRAL AIRLINES, INC., SOUTHERN AIRWAYS, INC., EASTERN AIR LINES, INC., NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., OZARK AIR LINES, INC., AMERICAN AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., and UNITED AIR LINES, INC.,

Plaintiffs,

against

WERNER H. KRAMARSKY, individually and in his capacity as Commissioner of the New York State Division of Human Rights; ANN THACHER ANDERSON, individually and in her capacity as General Counsel of the New York State Division of Human Rights; the NEW YORK STATE DIVISION OF HUMAN RIGHTS, an agency of the Executive Department of the State of New York; ARTHUR COOPERMAN, individually and in his capacity as Chairman of the New York State Workmen's Compensation Board; and the NEW YORK STATE WORKMEN'S COMPENSATION BOARD,

Defendants.

Plaintiffs, for their complaint, aver:

1. The jurisdiction of this Court over this action is invoked under Title 28, United States Code, §§1331, 1337

and 1343(3). The value of the matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars. The action arises under the Constitution and laws of the United States and particularly under:

(a) U.S. Const., art. I, §8, cl. 3;

(b) U.S. Const., art. VI, cl. 2;

(c) U.S. Const., amend. XIV;

(d) 42 U.S.C. §1983;

(e) Equal Pay Act of 1963, 29 U.S.C. §206(d);

(f) Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*;

(g) Executive Order 11246, 3 C.F.R. 169 (1974);

(h) Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001, *et seq.* ("ERISA");

(i) Railway Labor Act, 45 U.S.C. §§151, *et seq.* ("RLA");

2. This is a proceeding for a preliminary and permanent injunction to enjoin the Defendants from enforcing against the Plaintiffs certain laws of the State of New York in a manner that conflicts with the Constitution and laws of the United States, as hereinafter more fully appears. This is also an action for a declaratory judgment pursuant to 28 U.S.C. §2201, for the purpose of determining an actual controversy between the parties, as hereinafter more fully appears.

3. Plaintiffs Delta Air Lines, Inc., Allegheny Airlines, Inc., National Airlines, Inc., Piedmont Aviation,

INC., BRANIFF AIRWAYS, INC., NORTH CENTRAL AIRLINES, INC., SOUTHERN AIRWAYS, INC., EASTERN AIR LINES, INC., NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., OZARK AIR LINES, INC., AMERICAN AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., and UNITED AIR LINES, INC. are corporations duly organized and authorized to engage in the commercial air transportation business and have, at all times relevant hereto, been duly licensed by appropriate federal agencies to engage in the transportation by air of passengers and cargo within and among the several states of the United States and abroad.

4. Defendant, NEW YORK STATE DIVISION OF HUMAN RIGHTS (hereinafter the "Division"), is an administrative agency of the Executive Department of the State of New York, existing under and by virtue of an act of the State of New York entitled "Human Rights Law," New York Executive Law §§290 *et seq.*, and is specifically charged with the administration and enforcement of said Act.

5. Defendant, WERNER H. KRAMARSKY, is the duly appointed Commissioner of the Defendant Division, and is specifically granted the authority, individually or through his duly authorized officers or employees, to prosecute or hear complaints regarding alleged violations of the Human Rights Law.

6. Defendant, ANN THACHER ANDERSON, is an officer or employee of the Commissioner of the Defendant Division and is duly authorized to hear or prosecute complaints against the Plaintiffs, as hereinafter more fully appears.

7. Defendant NEW YORK STATE WORKMEN'S COMPENSATION BOARD (hereinafter the "Board"), exists under and by virtue of an act of the State of New York entitled "Workmen's Compensation Law," New York Workmen's Compensation Law §§1 *et seq.*, and is specifically charged with the administration and enforcement of said Act, including the Disability Benefits Law, New York Workmen's Compensation Law §§200 to 242 (hereinafter the "DBL").

8. Defendant, ARTHUR COOPERMAN, is the duly appointed Chairman of the Defendant Board, and, in the name of said Board, is specifically charged with the enforcement of the provisions of the New York Workmen's Compensation Law, including the DBL.

INTRODUCTORY FACTUAL ALLEGATIONS

9. Plaintiffs maintain various employee benefit plans, including sickness and accident disability plans, sick leave plans, and medical benefit plans, through which payments are made to Plaintiffs' employees who suffer from sicknesses or accidents falling within the coverage of the various plans.

10. Plaintiffs' employee benefit plans are funded and administered in several different ways, including:

(a) In some plans, the employer contributes a single premium to purchase insurance coverage from private insurance carriers for its employees;

(b) In some plans, the employer itself fully funds and administers the plan, often by establishing a trust fund;

(c) In some plans, the employer provides all funds but retains an insurance company or other institution to administer the plan;

(d) In some plans, the employer and the employees make joint contributions to the maintenance of a fund or the purchase of an insurance plan; and

(e) In some plans, the employees pay for all of the coverage.

11. In the employee benefit plans described in paragraphs nine and ten, Plaintiffs do not include complete coverage for disabilities or costs associated with pregnancies.

12. On August 3, 1977, the Governor of the State of New York signed into law certain amendments to sections 201(9) and 205(3) of the DBL. (N.Y. Laws 1977, Ch. 675, §86, effective Aug. 3, 1977) (hereinafter the "DBL Amendments").

13. The DBL Amendments expand the definition of "disability" under the DBL to include pregnancy related disabilities, place limitations on the required benefits payments for pregnancy related disabilities, and provide that an employer's liability under the DBL is the exclusive remedy of an employee for disability caused by or arising in connection with a pregnancy.

14. Prior to August 3, 1977 the DBL provided that no employee was entitled to benefits for a period of disability caused by or arising in connection with a pregnancy.

15. On December 20, 1976 the New York Court of Appeals ruled that employers who paid disability benefits for non-pregnancy related illnesses and injuries were required to pay them for pregnancy related disabilities in the case of *Brooklyn Union Gas Co.* v. *New York State Human Rights Appeals Board*, 41 N.Y.2d 84 (1976).

COUNT I: CLAIM FOR RELIEF AGAINST DEFENDANTS DIVISION, KRAMARSKY AND ANDERSON FOR PERIOD PRIOR TO DBL AMENDMENTS

Paragraphs one through fifteen of this Complaint are hereby repeated and incorporated by reference herein.

16. Prior to the August 3, 1977 DBL Amendments the Defendant Division issued "guidelines" which declare that an employer's policy of excluding complete pregnancy coverage from an employee benefit plan as described in paragraphs nine and ten is illegal under the New York State Human Rights Law.

17. The courts of the State of New York have issued opinions declaring that a policy of not including complete pregnancy coverage in employee benefit plans is illegal under the New York State Human Rights Law.

18. The Defendant Division has commenced, or has threatened to commence, or is likely to commence administrative cases against Plaintiffs because of Plaintiffs' policies of not including complete pregnancy coverage in their benefit plans.

19. By means of administrative cases and by other means, the Defendant Division and the individual Defendants, Kramarsky and Anderson, are seeking to compel Plaintiffs to include complete pregnancy coverage in their employee benefit plans.

SUB-COUNT 1-A: DECLARATORY RELIEF ON GROUND THAT THE ATTEMPTED REGULATION OF PLAINTIFFS' COMPENSATION POLICIES BY DEFENDANTS DIVISION, KRAMARSKY AND ANDERSON IS PREEMPTED BY "ERISA"

Paragraphs nine through nineteen of this Complaint are hereby repeated and incorporated by reference herein.

20. Plaintiffs, as employers subject to the Railway Labor Act, 45 U.S.C. §§151, *et seq.* (hereinafter the "RLA"), are covered employers under sections 3(11), 3(12), and 4 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001, *et seq.* (hereinafter "ERISA"), and, therefore, Plaintiffs' employee benefit plans are governed by ERISA. *Id.*, §1002(1).

21. Pursuant to Section 514 of ERISA, 29 U.S.C. §1144, ERISA preempts and "supersedes any and all State laws," including "laws, decisions, rules, regulations, or other State action having the effect of law," insofar as such laws "may now or hereafter relate to any employee benefit plan" subject to ERISA, whether they relate "directly or indirectly" to "the terms and conditions of employee benefit plans covered by [ERISA]."

22. Plaintiffs' employee benefit plans are covered by ERISA.

23. The attempts of Defendants Division, Kramarsky and Anderson to force Plaintiffs to include complete pregnancy coverage in their employee benefit plans clearly "relates to" Plaintiffs' employee benefit plans.

24. The "guidelines," judicial decisions, and threatened or actual administrative actions against Plaintiffs, as more specifically set out in paragraphs sixteen through nineteen, which declare Plaintiffs' failure to include complete pregnancy coverage to be unlawful under New York State law are superseded and preempted by ERISA and the Supremacy Clause (art. VI, cl. 2) of the United States Constitution.

25. The actions of Defendants Division, Kramarsky and Anderson will cause, under color of New York law, Plaintiffs to be subjected to the deprivation of rights secured by the Constitution of the United States, including the Supremacy Clause (art. VI, cl. 2), and by Acts of Congress providing for the equal rights of citizens or of persons within the jurisdiction of the United States. This deprivation is illegal under 42 U.S.C. §1983.

SUB-COUNT I-B: DECLARATORY RELIEF ON GROUND THAT COMPENSATION POLICIES OF PLAINTIFFS ARE REQUIRED BY FEDERAL LAW

Paragraphs nine through twenty-five of this Complaint are hereby repeated and incorporated by reference herein.

26. Title VII of the Civil Rights Act of 1964 and the Equal Pay Act require that male and female employees be compensated equally for equal work.

27. As federal contractors, Plaintiffs are required under Executive Order 11246 to pay their male and female employees equal compensation for equal work.

28. There are two components of compensation:

(1) "primary compensation" in the form of wages and salaries; and

(2) "supplementary compensation" which consists of payments made by the employer to secure the availability of direct financial benefits payable to employees including payments made under various employee benefit plans.

28. Plaintiffs provide equal "primary compensation" in the form of wages and salaries for equal work to their male and female employees.

30. Plaintiffs' "primary compensation" to their employees is not currently being challenged by Defendants Division, Kramarsky and Anderson.

31. Plaintiffs provide "suplementary compensation" that is fairly equivalent in value in terms of dollar benefits paid per salary dollar to their male and female employees.

32. More particularly, Plaintiffs provide employee benefit plans as described in paragraphs nine and ten which

are fairly equivalent in value in terms of dollar benefits paid per salary dollar to their male and female employees.

33. Plaintiffs' employee benefit plans are currently being challenged by Defendants Division, Kramarsky and Anderson, as is more particularly set forth in paragraphs sixteen through nineteen.

34. Plaintiffs' male and female employees are covered equally under the employee benefit plans for all disabilities which arise out of sickness or injury.

35. Pregnancy is neither a sickness nor an injury.

36. Complete pregnancy coverage is not included in the employee benefit plans that are set forth in paragraphs nine and ten.

37. The inclusion of complete pregnancy coverage in Plaintiffs' employee benefit plans would cause a substantial increase in the dollar value of benefits paid to women.

38. The inclusion of complete pregnancy coverage in Plaintiffs' employee benefit plans would cause no increase in the dollar value of benefits paid to men.

39. The inclusion of complete pregnancy coverage in Plaintiffs' employee benefit plans would result in Plaintiffs' male and female employees receiving unequal compensation for equal work, with females receiving greater compensation than their male counterparts.

40. For those employee benefit plans that are partially or totally funded by employee contributions, the inclusion

of complete pregnancy coverage will require male employees to pay additional money for benefits that they cannot receive.

41. Defendants Division, Kramarsky and Anderson are attempting to force Plaintiffs to include complete pregnancy coverage in their employee benefit plans in the manner set forth in paragraphs sixteen through nineteen.

42. If Plaintiffs are forced to include complete pregnancy coverage in their employee benefit plans, Plaintiffs will be in violation of the Title VII.

43. If Plaintiffs are forced to include complete pregnancy coverage in their employee benefit plans, Plaintiffs will be in violation of the Equal Pay Act.

44. If Plaintiffs are forced to include complete pregnancy coverage in their employee benefit plans, Plaintiffs will be in violation of Executive Order 11246.

45. The New York State Human Rights Law is being used by Defendants Division, Kramarsky and Anderson in this situation as a "state protective law" in order to give women a discriminatory advantage over men.

46. Because New York law in this situation conflicts with federal law, New York law is preempted and its enforcement in derogation of federal law is illegal under the United States Constitution.

47. The actions of Defendants Division, Kramarsky and Anderson will cause, under color of New York law, Plaintiffs to be subjected to the deprivation of rights secured by the Constitution of the United States, including the Supremacy Clause (art. VI, cl. 2), and by Acts of Congress providing for the equal rights of citizens or of persons within the jurisdiction of the United States. This deprivation is illegal under 42 U.S.C. §1983.

SUB-COUNT I-C: DECLARATORY RELIEF ON GROUND THAT ATTEMPTED REGULATION OF PLAINTIFFS' COMPENSATION POLICIES BY DEFENDANTS DIVISION, KRAMARSKY AND ANDERSON IS PREEMPTED BY THE "RLA"

Paragraphs nine through forty-seven of this Complaint are hereby repeated and incorporated by reference herein.

48. Plaintiffs are subject to the Railway Labor Act, 45 U.S.C. §§151, *et seq.* ("RLA"). 45 U.S.C. §181.

49. The RLA requires Plaintiffs to bargain with their organized employees concerning, *inter alia*, employee benefit plans, and regulates the manner in which Plaintiffs and their employees may bargain over this mandatory subject of bargaining.

50. Because Plaintiffs are interstate and international carriers, the RLA requires Plaintiffs to bargain for agreements with their organized employees which, *a fortiori*, become interstate collective bargaining agreements.

51. Pursuant to the RLA, Plaintiffs and their employees have negotiated interstate collective bargaining agree-

ments which provide, as relevant here, that complete pregnancy coverage will not be included in the employee benefit plans.

52. Pursuant to the RLA, "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except [by prescribed handling by the Mediation Board]." 45 U.S.C. §152, Seventh.

53. Plaintiffs' employee benefit plans, which exclude pregnancy as a covered "disability" under the plans, constitute "rates of pay, rules, or working conditions" as set out in 45 U.S.C. §152, Seventh.

54. Defendants Division, Kramarsky and Anderson are attempting to make illegal, alter, and vitiate the employee benefit plans embodied in Plaintiffs' collective bargaining agreements with their employees, all as more specifically set out in paragraphs sixteen through nineteen of this Complaint.

55. Plaintiffs are in a position of jeopardy and faced with risk and legal exposure since they cannot meet their obligations under the RLA and under the guidelines and rulings as set out in paragraphs sixteen through nineteen of this Complaint.

56. The aforementioned attempts by Defendants Division, Kramarsky and Anderson to change the terms of Plaintiffs' interstate collective bargaining agreements en-

tered into pursuant to the RLA are preempted by the RLA and are illegal under the Supremacy Clause (art. VI, cl. 2) of the United States Constitution.

57. The actions of Defendants Division, Kramarsky and Anderson will cause, under color of New York law, Plaintiffs to be subjected to the deprivation of rights secured by the Constitution of the United States, including the Supremacy Clause (art. VI, cl. 2), and by Acts of Congress providing for the equal rights of citizens or of persons within the jurisdiction of the United States. This deprivation is illegal under 42 U.S.C. §1983.

SUB-COUNT I-D: DECLARATORY RELIEF ON GROUND THAT EXTRA-TERRITORIAL IMPACT OF THE ATTEMPTED REGULATION OF PLAINTIFFS' EMPLOYEE BENEFIT PLANS BY DEFENDANTS DIVISION, KRAMARSKY AND ANDERSON IS INVALID UNDER THE DUE PROCESS CLAUSE AND THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

Paragraphs nine through fifty-seven of this Complaint are hereby repeated and incorporated by reference herein.

58. The development of Plaintiffs' compensation policies is an area of interstate commerce which, by its very nature, and under the mandates of the RLA, requires national uniformity.

59. Not only are Defendants Division, Kramarsky and Anderson attempting to alter those policies in the State of New York, as set out in paragraphs sixteen through nineteen, but also §298-a of the New York Human Rights Law

(under which Defendants presume to act) provides that said Defendants' aforementioned attempts shall have extra-territorial impact.

60. Such extra-territorial impact as prescribed by §298-a of the New York Human Rights Law is violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. U.S. Const. amend. XIV.

61. Moreover, to allow New York State, through Defendants Division, Kramarasky and Anderson and thus, *a fortiori,* other states to so regulate Plaintiffs' benefit plans subjects Plaintiffs to the possibility of conflicting state regulation.

62. The potential for conflicting state regulation in this area together with the conflicts which already exist create an intolerable burden on interstate commerce in an area which, by its nature, and under the RLA, requires uniformity of regulation. The attempted regulation by Defendants Division, Kramarsky and Anderson of Plaintiffs' benefit plans is therefore unconstitutional under the Commerce Clause of the United States Constitution. Art. I, §8, cl. 3.

63. The actions of Defendants Division, Kramarsky and Anderson and the effects of §298-a of the New York Human Rights Law will cause Plaintiffs, under color of New York law, to be subjected to the deprivation of rights secured by the Constitution of the United States, including the Commerce Clause and the Fourteenth Amendment, and by Acts

of Congress providing for the equal rights of citizens or of persons within the jurisdiction of the United States. This deprivation is illegal under 42 U.S.C. §1983.

SUB-COUNT I-E: INJUNCTIVE RELIEF ON GROUNDS THAT PLAINTIFFS' EMPLOYEE BENEFIT PLANS ARE REQUIRED BY FEDERAL LAW AND THAT THE ATTEMPT OF DEFENDANTS DIVISION, KRAMARSKY AND ANDERSON TO FORCE PLAINTIFFS TO INCLUDE PREGNANCY COVERAGE IS VOID UNDER, AND PREEMPTED BY, FEDERAL LAW

Paragraphs nine through sixty-three of this Complaint are hereby repeated and incorporated by reference herein.

64. If Defendants Division, Kramarsky and Anderson are permitted to continue the activities specified in this Complaint in an attempt to force Plaintiffs to include complete pregnancy coverage in their employee benefit plans, Plaintiffs will suffer irreparable and immediate harm for which Plaintiffs are without a plain, adequate, or speedy remedy at law. Plaintiffs have no effective remedies under state law and this suit for declaratory and injunctive relief is Plaintiffs' only means for securing relief.

SUB-COUNT I-F: DECLATORY RELIEF ON GROUND OF DEPRIVATION OF EQUAL RIGHTS

Paragraphs nine through sixty-four of this Complaint are hereby repeated and incorporated by reference herein.

65. Plaintiffs' current and future male employees have the right, under Title VII of the 1964 Civil Rights Act,

under the Equal Pay Act, and under Executive Order 11246, to be compensated on an equal basis with female employees for equal work.

66. The actions of Defendants Division, Kramarsky and Anderson as set forth in paragraphs sixteen through nineteen, which are here restated and incorporated by reference, will cause Plaintiffs' current and future male employees to be subjected to the deprivation of their right not to be discriminated against because of their sex in matters pertaining to compensation.

67. The actions of Defendants Division, Kramarsky and Anderson will cause, under color of New York law, citizens or persons within the jurisdiction of the United States to be subjected to the deprivation of rights secured by the Constitution of the United States and by Acts of Congress providing for the equal rights of such persons. This deprivation is illegal under 42 U.S.C. §1983.

68. The actions of Defendants Division, Kramarsky and Anderson will cause Plaintiffs direct and substantial injury by requiring Plaintiffs to pay the costs of substantial increases in "supplementary compensation" to their female employees.

69. The actions of Defendants Division, Kramarsky and Anderson will cause Plaintiffs direct and substantial injury by exposing Plaintiffs to liability under Title VII of the 1964 Civil Rights Act and the Equal Pay Act and to sanctions under Executive Order 11246 and particularly by forcing Plaintiffs under color of state law to pay "sup-

plementary compensation" to their female employees which will be substantially greater in value than the "supplementary compensation" paid to Plaintiffs' male employees.

70. Plaintiffs bring this action to prevent these injuries to themselves and to redress the threatened deprivation of the rights of their current and future male employees in a manner in which these employees have little chance of effectively protecting those rights on their own behalf.

SUB-COUNT I-G: INJUNCTIVE RELIEF ON GROUND OF DEPRIVATION OF EQUAL RIGHTS

Paragraphs nine through seventy of this Complaint are hereby repeated and incorporated by reference herein.

71. If Defendants Division, Kramarsky and Anderson are permitted to enforce the New York State Human Rights Law against the Plaintiffs in the manner specified in this Complaint, Plaintiffs and their male employees will suffer irreparable and immediate harm for which Plaintiffs and their male employees are without a plain, adequate, or speedy remedy at law. Plaintiffs and their male employees have no effective remedies under state law, and this suit for declaratory and injunctive relief is their only means for securing relief.

COUNT II: CLAIM FOR RELIEF AGAINST DEFENDANTS DIVISION, KRAMARSKY AND ANDERSON FOR PERIOD AFTER DBL AMENDMENTS

Paragraphs nine through seventy-one of this Complaint are hereby repeated and incorporated by reference herein.

72. Notwithstanding the DBL Amendments, Defendants Division, Kramarsky and Anderson continue to maintain that the guidelines, policies and interpretations of the New York State Human Rights Law set forth in paragraphs sixteen through nineteen remain in full force and effect.

73. Defendants Division, Kramarsky and Anderson, through administrative cases brought or maintained against Plaintiffs, are seeking to compel Plaintiffs to include complete pregnancy coverage in their employee benefit plans in effect subsequent to the DBL Amendments.

74. Such policies and actions of Defendants Division, Kramarsky and Anderson are unlawful and invalid under federal law for the reasons sets forth in Count I of this Complaint and each Sub-Count thereof.

WHEREFORE, Plaintiffs respectfully request that the Court grant Plaintiffs a judgment against Defendants Division, Kramarsky and Anderson on Counts I and II, and each Sub-Count thereof, declaring and adjudging as follows:

(a) that Plaintiffs' employee benefit plans are currently consistent with and governed by ERISA;

(b) that the State of New York and Defendants Division, Kramarsky and Anderson lack jurisdiction to enforce laws or regulations governing Plaintiffs' employee benefit plans because of §514 of ERISA;

(c) that the laws, rules, regulations and guidelines of the State of New York and of Defendant Division, are unlawful and void under the Supremacy Clause (art. VI, cl. 2) of the United States Constitution

and superseded and preempted by ERISA insofar as they require Plaintiffs to include complete pregnancy coverage in their benefit plans;

(d) that Plaintiffs' employee benefit plans are currently consistent with and required by federal laws relating to equal employment opportunity;

(e) that the State of New York and Defendants Division, Kramarsky and Anderson lack jurisdiction to enforce state laws where such enforcement would contravene federal laws relating to equal employment opportunity;

(f) that the laws, rules, regulations and guidelines of the State of New York and of Defendant Division are unlawful and void under the Supremacy Clause (art. VI, cl. 2) of the United States Constitution as in conflict with federal law, including Title VII, the Equal Pay Act, and Executive Order 11246, insofar as they require Plaintiffs to include complete pregnancy coverage in their employee benefit plans;

(g) that Plaintiffs' employee benefit plans which are the result of collective bargaining between Plaintiffs and their employees are required by and governed by the RLA;

(h) that the State of New York and Defendants Division, Kramarsky and Anderson lack jurisdiction to enforce laws where such enforcement would alter the terms of such employee benefit plans which are the result of collective bargaining entered into pursuant to the RLA;

(i) that the laws, rules, regulations and guidelines of the State of New York and of Defendant Division are unlawful and void under the Supremacy Clause

(art. VI, cl. 2) of the United States Constitution as in conflict with federal labor laws insofar as they require Plaintiffs to include pregnancy coverage in their employee benefit plans;

(j) that the State of New York and Defendants Division, Kramarsky and Anderson lack jurisdiction to enforce laws where such laws would have an extra-territorial impact under §298-a of the New York Human Rights Law and create an intolerable burden on interstate commerce;

(k) that the laws, rules, regulations and guidelines of the State of New York and of Defendant Division and in particular §298-a of the New York Human Rights Law, are unlawful and void under the Due Process Clause (amend. XIV) and Commerce Clause (art. I, §8, cl. 3) of the United States Constitution as an intolerable burden on interstate commerce insofar as they require Plaintiffs to include complete pregnancy coverage in their benefit plans;

(l) that Plaintiffs' male employees, under their federally-established right, are currently receiving compensation under policies which do not discriminate against them because of their sex;

(m) that the addition of complete pregnancy coverage to Plaintiffs' employee benefit plans would tend to force Plaintiffs to deprive Plaintiffs' male employees of their federal rights to equal compensation;

(n) that Plaintiffs' benefit plans are currently consistent with and governed by federal law;

(o) that the attempts by Defendants Division, Kramarsky and Anderson to regulate, under color of

state law, Plaintiffs' benefit plans in a manner contrary to federal law and the Supremacy Clause violates Plaintiffs' rights under 42 U.S.C. §1983;

and further, that this Court:

(p) grant a preliminary and permanent injunction, enjoining Defendants Division, Kramarsky and Anderson, their agents, successors and employees from compelling or attempting to compel, or in any way causing Plaintiffs to abandon their benefit policies;

(q) grant a preliminary and permanent injunction, enjoining Defendants Division, Kramarsky and Anderson, their agents, successors and employees from prosecuting the Plaintiffs in any administrative cases because of Plaintiffs' employee benefit plans;

(r) rule that Plaintiffs are entitled to reasonable attorney's fees under the Civil Rights Attorneys' Fees Awards Act of 1976, P.L. 94559, and under other applicable law; and

(s) allow Plaintiffs their costs herein, including such other and futher relief as the Court deems appropriate.

COUNT III: CLAIM FOR RELIEF AGAINST DEFENDANTS WORKMEN'S COMPENSATION BOARD AND COOPERMAN

Paragraphs nine through seventy-four of this Complaint are hereby repeated and incorporated by reference herein.

75. The DBL Amendments, on their face, purport to require Plaintiffs to pay benefits to employees absent from

work due to pregnancy or pregnancy related conditions and, on information and belief, Defendants Board and Cooperman intend to enforce such requirements against Plaintiffs under color of state law.

76. Defendants Board and Cooperman have issued interpretations and regulations pursuant to the DBL, as amended, which declare that an employer must pay disability benefits to employees for disabilities caused by or arising in connection with pregnancy to the same extent that such benefits are provided to employees for non-pregnancy related disabilities.

SUB-COUNT III-A: DECLARATORY RELIEF ON GROUND THAT THE ATTEMPTED REGULATION OF PLAINTIFFS' BENEFIT PLANS BY DEFENDANTS BOARD AND COOPERMAN IS PREEMPTED BY "ERISA"

Paragraphs nine through seventy-six of this Complaint are hereby restated and incorporated by reference herein.

77. Plaintiffs, as employers subject to the Railway Labor Act, 45 U.S.C. §§151, *et seq.* ("RLA"), are covered employers under sections 3(11), 3(12), and 4 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001, *et seq.* ("ERISA"), and, therefore, Plaintiffs' employee benefit plans are governed by ERISA. *Id.*, §1002(1).

78. Pursuant to Section 514 of ERISA, 29 U.S.C. §1144, ERISA preempts and "supersedes any and all State laws," including "laws, decisions, rules, regulations, or other State action having the effect of law," insofar as such laws

"may now or hereafter relate to any employee benefit plan" subject to ERISA, whether they relate "directly or indirectly" to "the terms and conditions of employee benefit plans covered by [ERISA]."

79. Plaintiffs' employee benefit plans are covered by ERISA.

80. The attempts of Defendants Board and Cooperman to force Plaintiffs to include pregnancy coverage in their employee benefit plans clearly "relate to" Plaintiffs' employee benefit plans.

81. Plaintiffs' employee benefit plans are not maintained solely to comply with any state workmen's compensation laws or unemployment insurance or disability insurance laws.

82. The New York Disability Benefits Law, as amended to require pregnancy related disability benefits payments, and the interpretations and regulations of Defendants Board and Cooperman issued pursuant to such State law as set forth in paragraphs seventy-five and seventy-six, are superseded and preempted by ERISA and the Supremacy Clause (art. VI, cl.2) of the United States Constitution.

83. The actions of Defendants Board and Cooperman will cause Plaintiffs, under color of New York law, to be subjected to the deprivation of rights secured by the Constitution of the United States, including the Supremacy Clause (art. VI, cl. 2), and by Acts of Congress providing

for the equal rights of citizens or of persons within the jurisdiction of the United States. This deprivation is illegal under 42 U.S.C. §1983.

SUB-COUNT III-B: DECLARATORY RELIEF ON GROUND THAT COMPENSATION POLICIES OF PLAINTIFFS ARE REQUIRED BY FEDERAL LAW

Paragraphs nine through eighty-three of this Complaint are hereby restated and incorporated by reference herein.

84. Title VII of the Civil Rights Act of 1964 and the Equal Pay Act require that male and female employees be compensated equally for equal work.

85. As federal contractors, Plaintiffs are required under Executive Order 11246 to pay their male and female employees equal compensation for equal work.

86. There are two components of compensation:

(1) "primary compensation" in the form of wages and salaries; and

(2) "supplementary compensation" which consists of payments made by the employer to secure the availability of direct financial benefits payable to employees including payments made under various employee benefit plans.

87. Plaintiffs provide equal "primary compensation" in the form of wages and salaries for equal work to their male and female employees.

88. Plaintiffs provide "supplementary compensation" that is fairly equivalent in value in terms of dollar benefits paid per salary dollar to their male and female employees.

89. More particularly, Plaintiffs provide employee benefit plans as described in paragraphs nine and ten which are fairly equivalent in value in terms of dollar benefits paid per salary dollar to their male and female employees.

90. Defendants Board and Cooperman are currently attempting to compel Plaintiffs to substantially alter their employee benefit plans as is more particularly set forth in paragraphs seventy-five and seventy-six.

91. Plaintiffs' male and female employees are covered equally under the employee benefit plans for all disabilities which arise out of sickness or injury.

92. Pregnancy is neither a sickness nor an injury.

93. Complete pregnancy coverage is not included in the employee benefit plans that are set forth in paragraphs nine and ten.

94. The inclusion of complete pregnancy coverage in Plaintiffs' employee benefit plans would cause a substantial increase in the dollar value of benefits paid to women.

95. The inclusion of complete pregnancy coverage in Plaintiffs' employee benefit plans would cause no increase in the dollar value of benefits paid to men.

96. The inclusion of complete pregnancy coverage in Plaintiffs' employee benefit plans would result in Plaintiffs' male and female employees receiving unequal compensation for equal work, with females receiving greater compensation than their male counterparts.

97. For those employee benefit plans that are partially or totally funded by employee contributions, the inclusion of complete pregnancy coverage will require male employees to pay additional money for benefits that they cannot receive.

98. The Defendants Board and Cooperman are attempting to force Plaintiffs to include complete pregnancy coverage employee benefit plans in the manner set forth in paragraphs seventy-five and seventy-six.

99. If Plaintiffs are forced to include complete pregnancy coverage in their employee benefit plans, Plaintiffs will be in violation of Title VII.

100. If Plaintiffs are forced to include complete pregnancy coverage in their employee benefit plans, Plaintiffs will be in violation of the Equal Pay Act.

101. If Plaintiffs are forced to include complete pregnancy coverage in their employee benefit plans, Plaintiffs will be in violation of Executive Order 11246.

102. The New York DBL is being used by Defendants Board and Cooperman in this situation as a "state protec-

tive law" in order to give women a discriminatory advantage over men.

103. Because New York law in this situation conflicts with federal law, New York law is preempted and its enforcement in derogation of federal law is illegal under the United States Constitution.

104. The actions of Defendants Board and Cooperman will cause Plaintiffs, under color of New York law, to be subjected to the deprivation of rights secured by the Constitution of the United States, including the Supremacy Clause (Art. VI, cl. 2), and by Acts of Congress providing for the equal rights of citizens or of persons within the jurisdiction of the United States. This deprivation is illegal under 42 U.S.C. §1983.

SUB-COUNT III-C: DECLATORY RELIEF ON GROUND THAT THE ATTEMPTED REGULATION OF PLAINTIFFS' COMPENSATION POLICIES BY DEFENDANTS BOARD AND COOPERMAN IS PREEMPTED BY THE "RLA"

Paragraphs nine through one hundred-four of this Complaint are hereby restated and incorporated by reference herein.

105. Plaintiffs are subject to the Railway Labor Act, 45 U.S.C. §§151, *et seq.* ("RLA"). 45 U.S.C. §181.

106. The RLA requires Plaintiffs to bargain with their organized employees concerning, *inter alia,* employee benefit plans, and regulates the manner in which Plaintiffs and

their employees may bargain over this mandatory subject of bargaining.

107. Because Plaintiffs are interstate and international carriers, the RLA requires Plaintiffs to bargain for agreements with their organized employees which, *a fortiori*, become interstate collective bargaining agreements.

108. Pursuant to the RLA, Plaintiffs and their organized employees have negotiated interstate collective bargaining agreements which provide, as relevant here, that complete pregnancy coverage will not be included in the employee benefit plans.

109. Pursuant to the RLA, "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except [by prescribed handling by the Mediation Board]." 45 U.S.C. §152, Seventh.

110. Plaintiffs' employee benefit plans, which exclude pregnancy as a covered "disability" under the plans, constitute "rates of pay, rules, or working conditions" as set out in 45 U.S.C. §152, Seventh.

111. Defendants Board and Cooperman are attempting to make illegal, alter, and vitiate the employee benefit plans embodied in Plaintiffs' collective bargaining agreements with their employees, all as more specifically set out in paragraphs seventy-five and seventy-six of this Complaint.

112. Plaintiffs are in a position of jeopardy and faced with risk and legal exposure since they cannot meet their obligations under the RLA and under the interpretations and regulations of Defendants Board and Cooperman as set out in paragraphs seventy-five and seventy-six of this Complaint.

113. The aforementioned attempts by Defendants Board and Cooperman to change the terms of Plaintiffs' interstate collective bargaining agreements entered into pursuant to the RLA are preempted by the RLA and are illegal under the Supremacy Clause (art. VI, cl. 2) of the United States Constitution.

114. The actions of Defendants Board and Cooperman will cause Plaintiffs, under color of New York law, to be subjected to the deprivation of rights secured by the Constitution of the United States, including the Supremacy Clause (art. VI, cl. 2), and by Acts of Congress providing for the equal rights of citizens or of persons within the jurisdiction of the United States. This deprivation is illegal under 42 U.S.C. §1983.

SUB-COUNT III-D: INJUNCTIVE RELIEF ON GROUNDS THAT PLAINTIFFS' EMPLOYEE BENEFIT PLANS ARE REQUIRED BY FEDERAL LAW AND THAT THE ATTEMPT OF DEFENDANTS BOARD AND COOPERMAN TO FORCE PLAINTIFFS TO INCLUDE PREGNANCY COVERAGE IS VOID UNDER, AND PREEMPTED BY, FEDERAL LAW

Paragraphs nine through one hundred-fourteen of this Complaint are hereby restated and incorporated by reference herein.

115. If Defendants Board and Cooperman are permitted to continue the activities specified in this Complaint in an attempt to force Plaintiffs to include complete pregnancy coverage in their employee benefit plans, Plaintiffs will suffer irreparable and immediate harm for which Plaintiffs are without a plain, adequate, or speedy remedy at law. Plaintiffs have no effective remedies under state law and this suit for declaratory and injunctive relief is Plaintiffs' only means for securing relief.

SUB-COUNT III-E: DECLARATORY RELIEF ON GROUND OF DEPRIVATION OF EQUAL RIGHTS

Paragraphs nine through one hundred-fifteen of this Complaint are hereby restated and incorporated by reference herein.

116. Plaintiffs' current and future male employees have the right, under Title VII of the 1964 Civil Rights Act, under the Equal Pay Act, and under Executive Order 11246, to be compensated on an equal basis with female employees for equal work.

117. The actions of Defendants Board and Cooperman, as set forth in paragraphs seventy-five and seventy-six, which are here restated and incorporated by reference, will cause Plaintiffs' current and future male employees to be subjected to the deprivation of their right not to be discriminated against because of their sex in matters pertaining to compensation.

118. The actions of Defendants Board and Cooperman will cause, under color of New York law, citizens or persons

within the jurisdiction of the United States to be subjected to the deprivation of rights secured by the Constitution of the United States and by Acts of Congress providing for the equal rights of such persons. This deprivation is illegal under 42 U.S.C. §1983.

119. The actions of Defendants Board and Cooperman will cause Plaintiffs direct and substantial injury by requiring Plaintiffs to pay the costs of substantial increases in "supplementary compensation" to their female employees.

120. The actions of Defendants Board and Cooperman will cause Plaintiffs direct and substantial injury by exposing Plaintiffs to liability under Title VII of the 1964 Civil Rights Act and the Equal Pay Act and to sanctions under Executive Order 11246 and particularly by forcing Plaintiffs under color of state law to pay "supplementary compensation" to their female employees which will be substantially greater in value than the "supplementary compensation" paid to Plaintiffs' male employees.

121. Plaintiffs bring this action to prevent these injuries to themselves and to redress the threatened deprivation of the rights of their current and future male employees in a manner in which these employees have little chance of effectively protecting those rights on their own behalf.

SUB-COUNT III-F: INJUNCTIVE RELIEF ON GROUND OF DEPRIVATION OF EQUAL RIGHTS

Paragraphs nine through one hundred-twenty-one of this Complaint are hereby restated and incorporated by reference herein.

112. If Defendants Board and Cooperman are permitted to enforce the New York Disability Benefits Law against the Plaintiffs in the manner specified in this Complaint, Plaintiffs and their male employees will suffer irreparable and immediate harm for which Plaintiffs and their male employees are without a plain, adequate, or speedy remedy at law. Plaintiffs and their male employees have no effective remedies under state law, and this suit for declaratory and injunctive relief is their only means for securing relief.

WHEREFORE, Plaintiffs respectfully request that the Court grant Platintiffs a judgment against Defendants Board and Cooperman on Count III, and each Sub-Count thereof, declaring and adjudging as follows:

(a) that Plaintiffs' employee benefit plans are currently consistent with and governed by ERISA;

(b) that the State of New York and Defendants Board and Cooperman lack jurisdiction to enforce laws or regulations governing Plaintiffs' employee benefit plans because of §514 of ERISA;

(c) that the laws, regulations and interpretations of the State of New York and of Defendant Board are unlawful and void under the Supremacy Clause (art. VI. cl. 2) of the United States Con-

stitution and superseded and preempted by ERISA insofar as they require Plaintiffs to include complete pregnancy coverage in their benefit plans;

(d) that Plaintiffs' employee benefit plans are currently consistent with and required by federal laws relating to equal employment opportunity;

(e) that the State of New York and Defendants Board and Cooperman lack jurisdiction to enforce state laws where such enforcement would contravene federal laws relating to equal employment opportunity;

(f) that the laws, regulations and interpretations of the State of New York and of Defendant Board are unlawful and void under the Supremacy Clause (art. VI, cl. 2) of the United States Constitution as in conflict with federal law, including Title VII, the Equal Pay Act, and Executive Order 11246, insofar as they require Plaintiffs to include complete pregnancy coverage in their employee benefit plans;

(g) that Plaintiffs' employee benefit plans which are the result of collective bargaining between Plaintiffs and their employees are required by and governed by the RLA;

(h) that the State of New York and Defendants Board and Cooperman lack jurisdiction to enforce laws where such enforcement would alter the terms of such employee benefit plans which are the result of collective bargaining entered into pursuant to the RLA;

(i) that the laws, regulations and interpretations of the State of New York and of Defendant Board are unlawful and void under the Supremacy

Clause (art VI, cl. 2) of the United States Constitution as in conflict with federal labor law insofar as they require Plaintiffs to include pregnancy coverage in their employee benefit plans;

(j) that Plaintiffs' male employees, under their federally-established right, are currently receiving compensation under policies which do not discriminate against them because of their sex;

(k) that the addition of complete pregnancy coverage to Plaintiffs' employee benefit plans would tend to force Plaintiffs to deprive Plaintiffs' male employees of their federal rights to equal compensation;

(l) that Plaintiffs' benefit plans are currently consistent with and governed by federal law;

(m) that the attempts by Defendants Board and Cooperman to regulate, under color of state law, Plaintiffs' benefit plans in a manner contrary to federal law and the Supremacy Clause violates Plaintiffs' rights under 42 U.S.C. §1983;

and further, that this Court:

(n) grant a preliminary and permanent injunction, enjoining Defendants Board and Cooperman, their agents, successors and employees from compelling or attempting to compel, or in any way causing Plaintiffs to abandon their current benefit policies;

(o) grant a preliminary and permanent injunction, enjoining Defendants Board and Cooperman, their agents, successors and employees from prosecuting the Plaintiffs in any administrative cases because of Plaintiffs' employee benefit plans;

(p) rule that Plaintiffs are entitled to reasonable attorney's fees under the Civil Rights Attorneys' Fees Awards Act of 1976, P.L. 94559, and under other applicable law; and

(q) allow Plaintiffs their costs herein, including such other and further relief as the Court deems appropriate.

New York, New York
December 30, 1977

SEWARD & KISSEL

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Of Counsel

Defendants' Answer, Dated March 17, 1980— *Delta Air Lines, Inc.* v. *Kramarsky*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 3358 (MEL)

DELTA AIR LINES, INC., *et al.*,

Plaintiffs,

against

WERNER H. KRAMARSKY, *et al.*,

Defendants.

Defendants, by their attorney, Louis J. Lefkowitz, Attorney General of the State of New York, for their answer respectfully allege:

FIRST DEFENSE

1. Deny that this action arises under the Constitution or statutes of the United States and deny that there has been any deprivation or threatened deprivation under color of any statute, ordinance, regulation, custom or usage of the State of New York of any rights, privileges or immunities secured to the plaintiffs by the Constitution or statutes of the United States.

Defendants' Answer—Delta Air Lines

SECOND DEFENSE

2. The complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

3. Deny each and every allegation of paragraph "1" of the amended complaint herein except admit that plaintiffs purport to invoke the jurisdiction of this Court under the statutes set forth therein.

4. Deny each and every allegation of paragraph "2" except admit that plaintiffs seek to obtain declaratory and injunctive relief.

5. Deny knowledge and information sufficient to form a belief as to the truth of the allegations set forth in paragraphs "3", "9", "10", "11", "20", "22", "29", "30", "31", "32", "36", "38", "48", "51", "77", "79", "87", "88", "89", "93", "105", and "108".

6. Deny each and every allegation of paragraph "4" and refer the Court to the Human Rights Law, New York Executive Law §§ 290 *et seq.* (hereinafter "HRL").

7. Deny each and every allegation of paragraph "5" except admit that defendant Kramarsky is the State Commissioner of Human Rights, duly appointed by the Governor of the State of New York, and refer the Court to the HRL as to the nature and extent of his authority.

8. Deny each and every allegation of paragraph "6" except admit that Ann Thacher Anderson is General Counsel of the State Division of Human Rights (hereinafter the "Division") and refer the Court to the HRL as to the nature and extent of her authority.

9. Deny each and every allegation of paragraph "7" and refer the Court to the New York State Workmen's Compensation Law §§ 1 *et seq.* (herinafter "WCL"), particularly the Disability Benefits Law, WCL §§ 200 to 242 (hereinafter "DBL").

10. Deny each and every allegation of paragraph "8" except admit that defendant Cooperman is the Chairman of the New York State Workmen's Compensation Board and refer the Court to the WCL as to the nature and extent of his authority.

11. Admit each and every allegation contained in paragraph "12" and refer the Court to New York Laws 1977, Ch. 675, § 86 (hereinafter the "DBL Amendments").

12. Deny each and every allegation of paragraph "13" and refer the Court to the DBL amendments.

13. Deny each and every allegation of paragraph "14" and refer the Court to the DBL amendments.

14. Deny each and every allegation of paragraph "15" and refer the Court to the case of *Brooklyn Union Gas Co.* v. *New York State Human Rights Appeal Board*, 41 N.Y. 2d 84 (1976).

15. Deny each and every allegation of paragraph "16" except admit that the Division has issued and published a ruling as to pregnancy, and respectfully refer the Court, for its content and effect, to 3CCH, Employment Practices Reporter ¶ 26,059A.

16. Deny each and every allegation of paragraph "17" except admit that the Court of Appeals of the State of New York has held that employers subject to the HRL must provide, for employees disabled in any way connected with pregnancy, terms, conditions and privileges of employment equivalent to those provided for employees disabled by non-occupational illness or injury. *Gas Co.* v. *Appeal Board*, 41 N.Y. 2d 84 (1976), reargument denied 42 N.Y. 2d 824 (1977).

17. Deny each and every allegation of paragraph "18" except admit that the Division, pursuant to the HRL, was receiving, investigating and conciliating, or hearing and adjudicating, complaints against some of the plaintiffs charging unlawful discrimination as to sex in terms, conditions and privileges, and alleging failure and refusal to provide for disabilities connected with pregnancy prior to the effective date of the DBL amendments and continue to do so with regard to fringe benefits equivalent to those provided for other temporary disabilities.

18. Deny each and every allegation of paragraph "19" except admit that prior to the DBL amendments through conciliation agreements, orders after hearing, and supporting litigation, defendants were seeking to effectuate the

purposes of the HRL and to assure that, in compliance therewith, employers subject to the law provide, for employees disabled in any way connected with pregnancy, terms, conditions and privileges of employment (including fringe benefits) equivalent to those provided for employees disabled by non-occupational injury or illness.

19. Deny each and every allegation of paragraphs "21" and "78" and refer the Court to Section 514 of ERISA, 29 U.S.C. § 1144.

20. Deny each and every allegation of paragraphs "23", "24", "25", "28", "33", "34", "35", "37", "39", "40", "41", "42", "43", "44", "45", "46", "47", "53", "54", "55", "56", "57", "58", "59", "60", "61", "62", "63", "64", "66", "67", "68", "69", "70", "71", "72", "73", "74", "76", "80", "81", "82", "83", "86", "90", "91", "92", "94", "95", "96", "97", "98", "99", "100", "101", "102", "103", "104", "110", "111", "112", "113", "114", "115", "117", "118", "119", "120", "121", and "122".

21. Deny each and every allegation of paragraphs "26" and "84" and refer the Court to Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000-e *et seq.* and the Equal Pay Act of 1963, 29 U.S.C. § 206(d).

22. Deny each and every allegation of paragraphs "27" and "85" and refer the Court to Executive Order 11246, 3 C.F.R. 169 (1974).

23. Deny each and every allegation of paragraphs "49", "59", "52", "106", "107" and "109" and refer the Court to the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*

24. Deny each and every allegation of paragraphs "65" and "116" and refer the Court to Title VII of the Civil Rights Act, the Equal Pay Act and Executive Order 11246.

25. Deny each and every allegation of paragraph "75" and refer the Court to the DBL amendments.

AS A FOURTH DEFENSE

26. ERISA does not pre-empt the State regulation of disability benefit plans insofar as it mandates that such plans provide for disability coverage on account of pregnancy.

AS A FIFTH DEFENSE

27. Since the allegations raised by plaintiffs with regard to Title VII, the Equal Pay Act and Executive Order 11246 refer only to speculative claims of third parties, plaintiffs' assertion of such claims is premature and, further, plaintiffs lack standing to assert such claims.

AS A SIXTH DEFENSE

28. The Division and the Board are not "persons" under 42 U.S.C. § 1983.

AS A SEVENTH DEFENSE

29. The claims asserted by plaintiffs pursuant to the RLA are collateral claims that do not bear upon the question of New York State's right to require compliance with its laws.

Defendants' Answer—Delta Air Lines

As an Eighth Defense

30. The Supremacy Clause of the United States Constitution does not preclude a state from regulating pregnancy disability since the DBL amendments are neither inconsistent with or in abrogation of any Federal law.

As a Ninth Defense

31. Plaintiffs, American Airlines and United, having commenced lawsuits in State courts and having received decisions with regard to the issues raised in the complaint pertaining to claims arising prior to August 3, 1977 are collaterally estopped from raising those issues in the instant case.

As a Tenth and Final Defense

32. Since plaintiff, Eastern Airlines, has commenced an action in the SDHR raising essentially the same issues as this complaint for that period of time prior to August 3, 1977 and has appealed this decision to the Appellate Division of the Supreme Court of the State of New York, this Court should abstain from rendering any decision with regard to them.

Dated: New York, New York
March 17, 1978

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Defendants
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Order to Show Cause and Affidavit, Dated September 27, 1979—*Burroughs Corporation* v. *Kramarsky*

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

File No. 79-778

BURROUGHS CORPORATION

Plaintiff,

vs

WERNER H. KRAMARSKY as the Commissioner of the New York State Division of Human Rights

Defendant.

Upon the summons and complaint herein, and the attached affidavit of Jack O'Leary, sworn to the 27th day of September, 1979 and after hearing Nixon, Hargrave, Devans and Doyle, Esqs., attorneys for Plaintiff, William E. McKnight, Esq., of counsel, in support of this Order,

NOW IT IS HERLBY ORDERED that Defendant show cause before this Court at the United States Court House, Rochester, New York on Oct. 9, 1979, at 10:00 a.m., or as soon thereafter as counsel can be heard why this Court should not grant the following relief:

Order to Show Cause and Affidavit—Burroughs

A. A preliminary injunction restraining Defendant and all those in active concert or participation with him from:

1. The further prosecution of complaints filed by employees of Plaintiff regarding Plaintiff's failure to pay disability benefits for pregnancy-related disabilities arising subsequent to January 1, 1975, and,

2. The further enforcement of any determination or order of Defendant or of the New York State Human Rights Appeal Board ("Appeal Board") or of any court of the State of New York in regard to such complaints.

B. A declaratory judgment indicating the rights and obligations of Plaintiff and Plaintiff's employees regarding pregnancy-related disabilities under the terms of Plaintiff's disability benefits plan subsequent to January 1, 1975.

C. Setting this matter for hearing on Plaintiff's application for a permanent injunction enjoining Defendant and all those in active concert or participation with him from the further prosecution or enforcement of the aforementioned claims.

It Is Further Ordered that it appearing that the Marshall cannot make timely service, Plaintiff's attorneys or agents be appointed to serve this Order, the Summons, the Complaint and the affidavit herein, upon Defendant by delivering to the State Division of Human Rights Office at Executive Office Building, 34 W. Main Street,

Order to Show Cause and Affidavit—Burroughs

Rochester, New York 14614, and that such service shall be deemed good and sufficient if accomplished on Oct. 5, 1979

IT IS FURTHER ORDERED that answering affidavits with regard to Plaintiff's request for a preliminary injunction be served upon Plaintiff's attorneys no later than Oct. 8, 1979 at 5:00 p.m.

Dated Oct. 5, 1979

Time

s/ HAROLD P. BURKE

Harold P. Burke
United States District Judge

Order to Show Cause and Affidavit—Burroughs

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

File No. ———

BURROUGHS CORPORATION

Plaintiff,

vs

WERNER H. KRAMARSKY as the Commissioner of the New York State Division of Human Rights

Defendant.

JACK O'LEARY, being duly sworn, deposes and says:

1. I am an officer, to wit Vice President & Group Executive of the Burroughs Corporation, Plaintiff herein, and am fully familiar with the facts of this action.

2. Subsequent to January 1, 1975, Plaintiff adopted a disability benefits plan on behalf of all of its employees. This plan provided for the payment of benefits to employees of Plaintiff who became disabled as the result of injuries not arising out of or in connection with their employment. This plan was also subject to the provisions of the federal Employee Retirement Income Security Act of 1974 ("ERISA").

3. Plaintiff's disability benefits plan contained no provisions for the payment of benefits for pregnancy-related disabilities. Further, Plaintiff did not pay any benefits to

its employees for pregnancy-related disabilities under that plan.

4. Plaintiff has consistently maintained that its disability benefit plan is consistent with all applicable provisions of state and federal law and, therefore, that Plaintiff was not obligated to pay such benefits.

5. On or about the following dates complaints were filed by the employees of Plaintiff so named with the New York State Division of Human Rights ("Division"). The complainants alleged that they had been denied disability benefits on the basis of sex due to Plaintiff's failure to pay such benefits for pregnancy-related disabilities and that such denial violated Section 296 of the New York State Human Rights Law.

i)	March 25, 1977	Patricia B. Confer
ii)	April 12, 1977	Denise DuFour
iii)	April 20, 1977	Theresa A. Wilson
iv)	April 27, 1977	Susan Peckman
v)	April 29, 1977	Mary F. Milliman
vi)	May 4, 1977	Fannie Williams
vii)	May 11, 1977	Barbara J. Jones
viii)	May 23, 1977	Michelle A. Pender
ix)	June 17, 1977	Carly M. Fuhrman
x)	July 28, 1977	Karole A. Jensen
xi)	November 4, 1977	Sheila Aman
xii)	November 15, 1977	Patricia Wolfe
xiii)	December 16, 1977	Earlene Palmer
vix)	February 2, 1978	Gloria Boston
xv)	February 15, 1978	Marsha Tavolocci

6. A Division Hearing Examiner determined that each complaint was supported by probable cause and that the Division properly had jurisdiction over each complaint. Each complaint, except that of Gloria Boston, was assigned to hearing.

7. A consolidated hearing was held on March 23, 1978 on the complaints of employees Confer, DuFour, Wilson, Milliman, Jones, Pender, Fuhrman and Jensen. Hearings were held on the complaints of Fannie Williams on January 17, 1978; Sheila Aman and Patricia Wolfe on May 16, 1978; Earlene Palmer on June 20, 1978 and July 14, 1978 and Susan Peckman on December 12, 1978. Plaintiff, which was represented by counsel at each of these hearings, raised the defense that the processing of these complaints was barred by the provisions of ERISA. No hearing has yet been held regarding the complaints of Marsha Tavolocci or Gloria Boston.

8. Following each of the above-referenced hearings, Division Hearing Examiners issued recommended findings of fact, decisions and orders, except as to the complaint of Susan Peckman on which no recommendations have yet been issued. Division Commissioner Werner H. Kramarsky subsequently adopted these recommendations. Commissioner Kramarsky found in every instance that the complainants were disabled due to pregnancy or complications of pregnancy; that Plaintiff unlawfully discriminated against complainants in failing to provide disability benefits for pregnancy and that Plaintiff unlawfully discriminated against female employees generally, because of

sex, in terms conditions and privileges of employment, in violation of section 296 of the Human Rights Law of New York.

9. In each of his determinations Commissioner Kramarsky ordered Plaintiff to cease and desist from any further discrimination; to restore all rights and benefits to complainants; to pay designated sums to each complainant representing amounts of disability benefits claimed by the complainants, and to provide medical and disability benefits to a class of all Plaintiff's female employees with pregnancy-connected disabilities which had occurred within one year of the filing of the complaint.

10. Plaintiff filed a timely appeal to the Human Rights Appeal Board from each of Commissioner Kramarsky's determinations.

11. The Appeal Board affirmed, in all respects, the Commissioner's determination in regard to the complaints of Fannie Williams and Patricia Wolfe, including his determination that all of Plaintiff's employees similarly situated be awarded class relief.

12. The Appeal Board affirmed, in part, the Commissioner's determination in regard to the complaints of Patricia Confer, Denise DuFour, Theresa Wilson, Mary Milliman, Barbara Jones, Michele Pender, Carly Fuhrman, Karole Jensen and Sheila Aman. The Appeal Board reversed the Commissioner's award of class relief to em-

ployees of Plaintiff who were similarly situated to these complainants.

13. The Appeal Board reversed the Commissioner's determination in regard to the complaint of Earlene Palmer. The Appeal Board held that the complaint of Ms. Palmer had not been timely filed and was, therefore, time-barred.

14. Plaintiff has filed a timely appeal to the Supreme Court of New York, Appellate Division, Fourth Department from each of the determinations of the Appeal Board except that in regard to the complaint of Earlene Palmer.

15. Upon information and belief, Plaintiff gave due notice to the parties to each proceeding of its appeals indicated in ¶ 14 above.

16. Upon information and belief, Commissioner Kramarsky and other members of the State Division of Human Rights, in active concert or participation with him, are preempted by ERISA from enforcing any provisions of the Human Rights Law so far as they relate to Plaintiff's disability benefits plan at the time the complaints were filed.

17. Upon information and belief, Commissioner Kramarsky's decisions and orders and those of the Human Rights Appeal Board are inconsistent and contrary to provisions of state law. While class relief was denied in nine of the Appeal Board's decisions (¶ 12 above) in two other decisions (¶ 11 above) the Appeal Board granted such

relief. Commissioner Kramarsky has continued to affirm awards of class relief although the Appeal Board has held that no such relief can be granted under the case of *Consolidated Edison Company of New York, Inc.* v. *State of Human Rights Appeal Board, et al.*, 409 N.Y.S.2d 141. Furthermore, Commissioner Kramarsky prosecuted the claims of Earlene Palmer and Fannie Williams which are time-barred under a recent decision of the Commissioner himself and the Appeal Board. (*Miller* v. *The Genesee Hospital* (Case No. ES-47322-77; Appeal No. 5239)).

18. Upon information and belief, procedural irregularities arising during the hearing process and determinations made by Division hearing examiners on insubstantial evidence as well as the inconsistency of Appeal Board's determinations constitute bad faith by the Commissioner and the Appeal Board and represent harassment of Plaintiff. These irregularities include the issuance of determinations by hearing examiners before counsel for Plaintiff was able to cross examine complainants; determinations by hearing examiners based entirely on hearsay or insufficient competent evidence and the refusal by hearing examiners to allow Plaintiff to submit memoranda of law at the hearings to support Plaintiff's position.

19. As further appears in Plaintiff's verified complaint, I am informed by counsel that Plaintiff has no adequate remedy at law to avoid the imminent and irreparable harm threatened by Defendants and each of them. Such harm includes the reimbursement of benefits, rights and privileges to Plaintiff's employees substantially in excess of

$10,000; the grant of class relief to Plaintiff's employees; Plaintiff's defense of these complaints in various parts of New York State while incurring substantial legal expense and damage to Plaintiff's goodwill, corporate integrity, ability to do business and hiring practices as a result of the effects of the wrongful processing of these complaints.

20. Because of the lack of a remedy at law, the threatened prosecution and enforcement of determinations of Defendant and those of the Appeal Board, Plaintiff requests that the Court issue a declaratory judgment determining Plaintiff's rights under its disability benefit plan subsequent to January 1, 1975 and that this court prevent such further prosecution and enforcement of these complaints by the Defendant through the issuance of a temporary and preliminary injunction, setting a hearing for permanent injunctive relief.

/s/ Jack O'Leary

Jack O'Leary

Sworn before me this 27th
day of September, 1979

/s/ Maria E. Koch
Notary Public

Maria E. Koch
Notary Public, State of N.Y., Monroe County
My Commission Expires March 30, 1980

Complaint, Dated October 11, 1979—
Burroughs Corporation* v. *Kramarsky

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

Civil Action File No. ——

BURROUGHS CORPORATION

Plaintiffs,

vs.

WERNER H. KRAMARSKY, as the Commissioner of the New York State Division of Human Rights

Defendant.

VERIFIED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

I.

JURISDICTION

1. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1331 since Defendant's actions and Defendant's contemplated actions violate 29 U.S.C. 1001 *et seq.*, Article VI, clause 2 and the Fourteenth Amendment to the Constitution of the United States. Jurisdiction is also invoked pursuant to 28 U.S.C. 1343 and 42 U.S.C. 1983 since Defendant's actions, under color of state law, deprive Plaintiff of its constitutional rights and pursuant to 28 U.S.C. 1337 since this action arises under 29 U.S.C. 1001 *et seq.*

which is an act of Congress regulating and protecting trade and commerce against restraints. Furthermore, declaratory relief is available pursuant to 28 U.S.C. 2201.

2. The amount in controversy exceeds $10,000, exclusive of interests or costs, in compensatory and other damages awarded or awardable by Defendant to employees of Plaintiff.

PLAINTIFF

3. Plaintiff Burroughs Corporation is a Delaware corporation authorized to do business in New York State, having offices at 1150 University Avenue, Rochester, New York, in the Western District of New York.

4. Redactron, Inc. is a subsidiary of Burroughs Corporation, having its offices at 10 Parkway Drive So., Hauppauge, New York.

DEFENDANT

5. Defendant, Werner H. Kramarsky is the Commissioner of the New York State Division of Human Rights, having his business office at Two World Trade Center, New York, New York.

ACTION

6. This is an action for a preliminary and permanent injunction, enjoining Defendant and all those in active concert or participation with him, from further prosecuting or enforcing claims, determinations and orders regarding

complaints filed by employees of Plaintiff charging Plaintiff with discrimination for its failure to pay disability benefits for pregnancy-related disabilities arising subsequent to January 1, 1975. Plaintiff also seeks a declaration of its rights and obligations under its disability benefits plan in regard to such benefits.

FACTS

7. Subsequent to January 1, 1975 Plaintiff offered a disability benefits plan providing coverage for its employees in the event of injuries not arising out of or in the course of their employment. Plaintiff's benefit plan did not include the payment of disability benefits to employees for any disability related to pregnancy.

8. Subsequent to January 1, 1975 female employees of Plaintiff who had been absent from work due to pregnancy-related disabilities submitted requests to Plaintiff for disability benefits pursuant to the aforementioned disability benefits plan. Plaintiff denied these requests.

9. Subsequent to January 1, 1975 and on various dates thereafter certain female employees who had been denied disability benefits for pregnancy-related disabilities filed complaints with the New York State Division of Human Rights ("State Division"). Each complainant alleged that Plaintiff's denial of disability benefits for pregnancy-related disabilities constituted discrimination on the basis of sex pursuant to Section 296 of the Human Rights Law of New York.

10. Regional Directors of the State Division found that the complaints of Plaintiff's employees were supported by probable cause and that the State Division had jurisdiction over each complaint. Almost all such complaints were assigned to hearing, such hearings being held on various dates in 1977 and 1978. On the basis of evidence produced at these hearings, Hearing Examiners of the State Division found that Plaintiff had discriminated against the complainants on the basis of sex despite Plaintiff's argument that the Employee Retirement Income Security Act of 1974 preempted the Human Rights Law to the extent it related to these claims. Plaintiff was directed to cease and desist from any further discrimination against its employees; to pay disability benefits to complainants; to restore all rights and benefits to complainants; and to pay disability benefits to all other employees who had been denied disability benefits for pregnancy-related disabilities during the one year period preceeding the filing of each complaint.

11. Defendant adopted the recommended findings of fact, determinations and orders of the hearing examiners. Plaintiff filed timely appeals from Defendant's decisions and orders to the New York State Human Rights Appeal Board ("Appeal Board"). The Appeal Board affirmed all but one of Defendant's determinations.

12. Plaintiff's further appeal and prosecution of the decisions and orders of Defendant and those of the Appeal Board would be futile in light of the decisions of Defendant and the affirmations of the Appeal Board.

13. Defendant has repeatedly ignored arguments presented by Plaintiff that Defendant's prosecution of these complaints is preempted by provisions of federal law; that the recommended findings of fact, determinations and orders of the hearing examiners were not supported and were contrary to the evidence presented at the hearings; that those hearings were conducted in such a way as to deny Plaintiff's right to a fair hearing and due process; that Defendant cannot properly grant relief to individuals who are not parties to those complaints; and that certain complaints were not timely filed.

14. Defendant has acted in bad faith in prosecuting these complaints which are unsupported on the law and facts. Defendant's actions in regard to these complaints constitutes harassment of Plaintiff.

15. Defendant has the authority pursuant to Section 298 of the New York Human Rights Law to seek judicial enforcement of his decisions and orders and those of the Appeal Board. Defendant is also obligated to further prosecute the recommended findings of fact, decisions and orders of State Division hearing examiners.

16. By reason of Defendant's actions, Plaintiff has suffered and will continue to suffer extreme hardship and actual and impending irreparable injury, loss and damage in Defendant's futher prosecution and enforcement of his determinations pursuant to his authority under Section 298 of the Human Rights Law of New York. Plaintiff will be required to expend legal fees and utilize members of its management to further defend these claims which

have no basis in law or fact. Plaintiff will be required to pay disability benefits substantially in excess of $10,000 in addition to restoring valuable benefits and privileges to the complainants. Plaintiff's defense of these unfounded and unauthorized claims will cause further irreparable harm to Plaintiff's corporate integrity and will impair Plaintiff's business operations.

17. Plaintiff's defense of these claims will be futile in light of the determinations of Defendant and the Appeal Board which are consistently contrary to federal law.

18. Plaintiff, therefore, has no adequate or speedy remedy at law, and this action for injunctive and declaratory relief is Plaintiff's only means of securing relief.

II.

Prayer For Relief

Wherefore, Plaintiff prays that this court:

1. Issue a temporary restraining order and a preliminary injunction ordering Defendant Werner H. Kramarsky and all those in active concert or participation with him to refrain immediately pending the final hearing and determination of this action from further prosecuting or otherwise enforcing his aforementioned determinations and the determinations of the Human Rights Appeal Board in the aforementioned complaints against Plaintiff.

2. Issue a permanent injunction perpetually enjoining and restraining Defendant Werner H. Kramarsky and all

those in active concert or participation with him from engaging in the conduct complained of herein.

3. Issue a declaratory judgment determining the rights and obligations of Plaintiff and Plaintiff's employees regarding pregnancy-related disabilities under Plaintiff's disability benefit plan, subsequent to January 1, 1975.

4. Award Plaintiff all costs and disbursements related to this action.

5. Award Plaintiff such other and further relief as this court may deem proper.

Dated: Oct. 11, 1979

s/ W. E. McKnight

William E. McKnight
Nixon, Hargrave, Devans & Doyle
Attorneys for Plaintiff
Lincoln First Tower
Rochester, New York 14603
Telephone: (716) 546-8000

Complaint, Dated February 17, 1980— *Metropolitan Life Insurance Company* v. *Kramarsky*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

80 Civ.

METROPOLITAN LIFE INSURANCE COMPANY,

Plaintiff,

against

WERNER H. KRAMARSKY, as Commissioner of the New York State Division of Human Rights, the NEW YORK STATE DIVISION OF HUMAN RIGHTS and the NEW YORK STATE HUMAN RIGHTS APPEAL BOARD,

Defendants.

Plaintiff, by its attorneys, FROSKAUER ROSE GOETZ & MENDELSOHN, for its complaint herein alleges:

SUMMARY OF ACTION

1. This action seeks declaratory and injunctive relief, prohibiting defendants from further prosecuting, adjudicating, and/or enforcing any orders with respect to, complaints filed by employees or plaintiff alleging discrimination under the New York Human Rights Law, Executive Law §§290-301 (McKinney 1976) ("HRL") in connection with the payment of disability or other benefits for pregnancy or pregnancy-related conditions under plaintiff's

employee benefit plans. This complaint is based on the ground that the HRL, and any action taken thereunder by defendants, insofar as such statute and/or action relates to plaintiff's employee benefit plans, have been preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.* ("ERISA").

JURISDICTION AND VENUE

2. This action arise under the Constitution and Laws of the United States, including Article VI of the Constitution and ERISA.

3. Jurisdiction is vested in this Court by virtue of 28 U.S.C. §§1331, 2201 and 2202. The amount in controversy exceeds the sum of $10,000 exclusive of interest and costs. Venue lies in this District pursuant to 28 U.S.C. 1391.

THE PARTIES

4. Plaintiff METROPOLITAN LIFE INSURANCE COMPANY ("Metropolitan") is a New York corporation with its principal offices in New York City. It is engaged in the sale of life insurance in interstate commerce.

5. Defendant WERNER H. KRAMARSKY is the Commissioner of the New York State Division of Human Rights ("Commissioner") and in that capacity is authorized, among other things, to receive, investigate, hold hearings with respect to and pass upon complaints alleging violations of the HRL.

6. Defendant NEW YORK STATE DIVISION OF HUMAN RIGHTS ("State Division") is an agency of the Executive Department of the State of New York, existing under and by virtue of the HRL and charged with the administration and enforcement of that act.

7. Defendant NEW YORK STATE HUMAN RIGHTS APPEAL BOARD ("Appeal Board") is an agency of the Executive Department of the State of New York, existing under and by virtue of the HRL and, among other things, is authorized to hear and determine appeals from all orders of the Commissioner.

FACTUAL BACKGROUND

8. Metropolitan maintains various plans or programs providing benefits to its employees, including plans maintained for the purpose of providing employees with medical, surgical, or hospital care or benefits, and benefits in the event of sickness or disability.

9. On or about February 8, 1977, one Diana Baraba ("Baraba") filed a complaint with the State Division charging Metropolitan with a discriminatory practice under the HRL. Baraba alleged that she was an employee of Metropolitan, that on or about January 29, 1976 she became disabled due to pregnancy and that she had been unlawfully denied disability benefits by Metropolitan for the period of her alleged disability.

10. The State Division subsequently determined that it had jurisdiction over Baraba's complaint and that there

was probable cause to believe that Metropolitan had engaged in a discriminatory practice in violation of the HRL. By notice dated January 28, 1980, Metropolitan was informed that a hearing on Baraba's complaint would be held on February 15, 1980. Metropolitan has moved before the State Division to dismiss the complaint on the ground that that State Division lacks the authority to proceed by reason of ERISA's preemption provisions and has requested an adjournment of the hearing until the motion has been decided. Nevertheless, the State Division has advised Metropolitan that the hearing will proceed as scheduled.

11. On or about October 5, 1978, one Cheryl M. Parker ("Parker") filed a complaint with the State Division charging Metropolitan with a discriminatory practice under the HRL. Parker alleged that she was an employee of Metropolitan, that on or about January 4, 1978 she had become disabled by reason of pregnancy or pregnancy-related conditions and that she had been unlawfully denied medical benefits for her pregnancy or pregnancy-related conditions comparable to those provided by Metropolitan for conditions unrelated to pregnancy.

12. The State Division subsequently determined that it had jurisdiction over Parker's complaint and that there was probable cause to believe that Metropolitan had engaged in a discriminatory practice in violation of the HRL. By notice dated January 28, 1980, Metropolitan was informed that a hearing on Parker's complaint would be held on February 15, 1980. Metropolitan has moved before

the State Division to dismiss the complaint on the ground that the State Division lacks the authority to proceed by reason of ERISA's preemption provisions and has requested an adjournment of the hearing until the motion has been decided. Nevertheless, the State Division has advised Metropolitan that the hearing will proceed as scheduled.

13. On or about August 22, 1977, one Jean Osborne ("Osborne") filed a complaint with the State Division charging Metropolitan with a discriminatory practice under the HRL. Osborne alleged that she was an employee of Metropolitan, that on or about May 22, 1977 she became disabled by reason of pregnancy or pregnancy-related conditions and that she had been unlawfully denied disability benefits by Metropolitan.

14. The State Division subsequently determined that it had jurisdiction over Osborne's complaint and that there was probable cause to believe that Metropolitan had engaged in a discriminatory practice in violation of the HRL. Hearings on Osborne's complaint were thereafter held before a hearing examiner of the State Division. In a Notice of Recommended Findings of Fact, Decision and Order dated January 17, 1980, the hearing examiner concluded that Metropolitan had discriminated against Osborne in violation of the HRL and ordered Metropolitan to pay Osborne $1,524.70 with interest at 6 per cent from August 22, 1977 and also to "identify other employees affected by Metropolitan's unlawful discriminatory practice at any time since the date proceeding by one year the filing

of the complaint, and pay them what they would have received if Metropolitan had provided, for employees disabled in some way connected with pregnancy, terms, conditions and privileges of employment equivalent to what it provided for employees disabled by non-occupational injury or illness."

15. Upon information and belief, the Notice of Recommended Findings of Fact, Decision and Order in the Osborne matter has been referred to the Commissioner for his review.

16. On or about July 22, 1977, one Marie Anne Spezia ("Spezia") filed a complaint with the State Division charging Metropolitan with a discriminatory practice under the HRL. Spezia alleged that she was an employee of Metropolitan, that on or about May 6, 1977 she became disabled due to pregnancy and that she had been unlawfully denied disability benefits by Metropolitan.

17. The State Division subsequently determined that it had jurisdiction over Spezia's complaint and that there was probable cause to believe that Metropolitan had engaged in a discriminatory practice in violation of the HRL. Hearings on the complaint were held before a hearing examiner of the State Division. In a notice of Recommended Findings of Fact, Decision and Order, the hearing examiner concluded that Metropolitan had discriminated against Spezia in violation of the HRL and ordered Metropolitan of pay her $1,202.93 with interest at 6 per cent from July 17, 1977. On or about November 27, 1979, the

Commissioner approved the conclusions of the hearing examiner with modifications and directed Metropolitan to pay Spezia $978.03 with interest at 6 per cent from July 17, 1977. On December 13, 1979, Metropolitan filed a notice of Appeal from the Commissioner's order and the matter is now pending before the Appeal Board.

PLAINTIFF'S CLAIM

18. Section 514(a) of ERISA, 29 U.S.C. §§1144(a) provides, with exceptions not relevant here, that the act "shall supersede any and all State Laws insofar as they may now or hereafter relate to any employee benefit plans . . . ."

19. Metropolitan's disability and medical plans are employee benefit plans within the meaning of ERISA and are therefore covered by ERISA.

20. The HRL and the actions of defendants thereunder as described above constitute "State Laws" within the meaning of ERISA which relate to employee benefit plans maintained by Metropolitan. Accordingly, such statute and actions are preempted by ERISA and defendants are therefore without authority to proceed to enforce the provisions of the HRL by means of the administrative proceedings now pending against Metropolitan.

21. By reason of defendant's continued prosecution and adjudication of, and attempts to enforce orders made with respect to, employee complaints under the HRL relating to employee benefit plans, notwithstanding that

such conduct is preempted by federal law, plaintiff has suffered and will continue to suffer irreparable harm in that it has been and will be required to expend substantial sums in legal and other costs defending these improper and unlawful actions, which costs cannot be recovered, and has been and will be subject to substantial impairment of its business reputation and goodwill by reason of defendant's improper and unlawful determinations that plaintiff has engaged in discriminatory practices.

WHEREFORE, plaintiff prays that this Court:

(a) Declare and adjudge that Metropolitan's disability and medical expense plans are employee benefit plans covered by ERISA;

(b) Declare and adjudge that ERISA preempts the HRL, and precludes defendants from enforcing the provisions thereof, insofar as they relate to employee benefit plans covered by ERISA;

(c) Preliminarily and permanently enjoin defendants, their successors, officers, agents, servants, employees and attorneys from further prosecuting, adjudicating, and/or enforcing any orders with respect to, the complaints filed with the State Division against Metropolitan by Diana Baraba, Cheryl M. Parker, Jean Osborne and Marie Anne Spezia and from taking any other action which relates to employee benefit plans maintained by Metropolitan; and

(d) Award to plaintiff its costs and disbursements and such other and further relief as may seem just and proper.

Dated: New York, New York
February 13, 1980

PROSKAUER ROSE GOETZ & MENDELSOHN

By /s/ SARA S. PORTNOY

A Member of the Firm
Attorneys for Plaintiff
300 Park Avenue
New York, New York 10022
(212) 593-9000

Affidavit of Joseph L. Rubsam, Dated February 13, 1980—*Metropolitan Life Insurance Company v. Kramarsky*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

METROPOLITAN LIFE INSURANCE COMPANY,

Plaintiff,

against

WERNER H. KRAMARSKY, as Commissioner of the New York State Division of Human Rights, the NEW YORK STATE DIVISION OF HUMAN RIGHTS and the NEW YORK STATE HUMAN RIGHTS APPEAL BOARD,

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JOSEPH L. RUBSAM, being duly sworn, deposes and says:

1. I am a Vice-President of plaintiff Metropolitan Life Insurance Company ("Metropolitan"), with responsibility for the administration of Metropolitan's benefit plans and programs. I make this affidavit in support of plaintiff's application for a preliminary injunction and temporary restraining order. Plaintiff seeks an order enjoining defendants, the New York State Division of Human Rights ("State Division"), the Commissioner thereof, and the

New York State Human Rights Appeal Board ("Appeal Board"), from further prosecuting, adjudicating, and/or enforcing any orders with respect to, complaints alleging that plaintiff, acting pursuant to the employee benefit plans it maintains, has violated the New York State Human Rights Law ("HRL") by failing to pay disability and other benefits to employees allegedly disabled by pregnancy. The bases for this application, as explained more fully in the accompanying Memorandum of Law, are that federal law—the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 *et seq.*—preempts state law with respect to employee benefit plans, and, accordingly, that defendants have no authority to enforce the provisions of the HRL in administrative proceedings now pending against Metropolitan—including two proceedings scheduled for public hearing on Friday, February 15, 1980.

Metropolitan's Employee Benefit Plans and Their Coverage by ERISA

2. Metropolitan maintains various plans or programs providing benefits to its employees, including plans maintained for the purpose of providing employees with medical, surgical, or hospital care or benefits, and benefits in the event of sickness or disability.

3. Such plans, including Metropolitan's medical expense and disability benefits, are "employee benefit plan[s]" within the meaning of ERISA, and, accordingly, are covered by and subject to regulation by that federal statute. See 29 U.S.C. §§1002(1) and (3), 1003.

The Proceedings Pending Before the State Division and the Appeal Board

4. On or about February 8, 1977, one Diana Baraba ("Baraba") filed a complaint with the State Division charging Metropolitan with a discriminatory practice under the HRL. (Case No. ES-47960-77). She alleged that she had become disabled due to pregnancy in January, 1976 and that she had been unlawfully denied disability benefits by Metropolitan for the period of her alleged disability. The State Division subsequently determined that it had jurisdiction over Baraba's complaint and that there was probable cause to believe that Metropolitan had engaged in a discriminatory practice in violation of the HRL. Copies of the Baraba complaint and the State Division's determination are annexed as Exhibit A.

5. By notice dated January 28, 1980, Metropolitan was informed that a hearing on Baraba's complaint would be held on February 15, 1980. Metropolitan has moved before the State Division to dismiss the complaint on the ground that the State Division lacks the authority to proceed by reason of ERISA's preemption provisions and has requested a postponement of the scheduled hearing until a determination on the motion. Nevertheless, the State Division has advised Metropolitan that it intends to conduct the hearing as scheduled on February 15 and has further advised, on an informal basis, that Metropolitan's motion to dismiss will be denied. Copies of the State Division's notice of hearing and Metropolitan's motion to dismiss and request for postponement are annexed as Exhibit B.

6. On or about October 5, 1978, one Cheryl M. Parker ("Parker") filed a complaint with the State Division charging Metropolitan with a discriminatory practice under the HRL. (Case No. ES-60537-78). She alleged that in January, 1978 she had become disabled by reason of pregnancy or pregnancy-related conditions and had been unlawfully denied medical benefits comparable to those provided by Metropolitan for conditions unrelated to pregnancy. The State Division subsequently determined that it had jurisdiction over Parker's complaint and that there was probable cause to believe that Metropolitan had engaged in a discriminatory practice in violation of the HRL. Copies of the Parker complaint and the State Division's determination are annexed as Exhibit C.

7. By notice dated January 28, 1980, Metropolitan was informed that a hearing on Parker's complaint would be held on February 15, 1980. As in the Baraba case, Metropolitan has moved to dismiss on the ground of federal preemption and has requested a postponement pending the outcome of the motion. But, as in the Baraba case, the State Division has advised Metropolitan that the hearing will proceed on February 15 and has informally advised that the motion to dismiss will be denied. Copies of the State Division's notice of hearing in the Parker case and Metropolitan's motion to dismiss and request for postponement are annexed as Exhibit D.

8. On or about August 22, 1977, one Jean Osborne ("Osborne") filed a complaint with the State Division (Case No. ES-52509-77). She alleged that in May, 1977

she had become disabled by reason of pregnancy or pregnancy-related conditions and had been unlawfully denied disability benefits by Metropolitan. The State Division subsequently determined that it had jurisdiction over Osborne's complaint and that there was probable cause to believe that Metropolitan had engaged in a discriminatory practice in violation of the HRL. Hearings were then held before a hearing examiner of the State Division who concluded, in a Notice of Recommended Findings of Fact, Decision and Order dated January 17, 1980, that Metropolitan had engaged in a discriminatory practice. The hearing examiner ordered Metropolitan to pay disability benefits to Osborne, with interest, to cease and desist from further "discriminatory" practices and to identify all other employees who had been similarly "discriminated" against and to pay them what they would have received if pregnancy-related disability were treated the same as conditions unrelated to pregnancy under Metropolitan's employee benefit plans. I understand and believe that the conclusions and order of the hearing examiner have now been referred to the Commissioner for his review. Copies of the Osborne complaint and the Notice of Recommended Findings of Fact, Decision and Order are annexed as Exhibit E.

9. On or about July 22, 1977, one Marie Ann Spezia ("Spezia") filed a complaint with the State Division (Case No. ES-51470-77). She alleged that in May, 1977 she had become disabled due to pregnancy and was unlawfully denied disability benefits by Metropolitan. The State Divi-

sion found that it had jurisdiction and that there was probable cause. Hearings were held and the hearing examiner concluded that Metropolitan had engaged in a discriminatory practice in violation of the HRL. He ordered Metropolitan to pay disability benefits to Spezia, with interest, and, on November 27, 1979, his conclusions and order were adopted, with certain modifications, by the Commissioner. On December 13, 1979 Metropolitan filed a notice of appeal from the Commissioner's order and the matter is now pending before the Appeal Board. Copies of the Spezia complaint, the hearing examiner's Notice of Recommended Findings of Fact, Decision and Order, the Commissioner's Notice of Order after Hearing and Metropolitan's Notice of Appeal are annexed as Exhibit F.

10. In light of the clear, controlling authority set forth in the accompanying memorandum of law, which establishes that the proceedings against Metropolitan by defendants as described above are preempted by ERISA, Metropolitan will suffer immediate and irreparable harm unless defendants are enjoined from further prosecuting, adjudicating, and/or attempting to enforce orders made with respect to, employee complaints under the HRL relating to Metropolitan's employee benefit plans. If the hearings scheduled for February 15, 1980 are permitted to proceed, Metropolitan will be forced to spend substantial amounts for legal and other costs and, I am informed by counsel, will have no remedy to recover those costs. Moreover, should the State Division and Appeal Board conclude, as seems likely, that Metropolitan was required to provide

the claimed benefits and thus has "discriminated" on the basis of sex, its business reputation and goodwill have been unnecessarily damaged and impaired—again without remedy.

11. The reason plaintiff seeks to proceed by order to show cause, rather than ordinary notice of motion, is that, in view of the hearings scheduled for February 15, 1980, it is faced with immediate harm which requires it to proceed as expeditiously as possible. Because of the immediacy of the harm, plaintiff is seeking a temporary restraining order which, I am informed by counsel, is unavailable under the ordinary notice of motion procedure.

12. No prior application has been made for the relief sought herein.

13. For the reasons stated, I respectfully request that the injunction as prayed for be granted.

/s/ JOSEPH L. RUBSAM

JOSEPH L. RUBSAM

Sworn to before me this
13th day of February, 1980.

/s/ WILLIAM F. LYONS

Notary Public

WILLIAM F. LYONS
Notary Public, State of New York
No. 41-2441150 Qual. in Queens Co.
Certificate filed in New York County
Commission Expires March 30, 1981

Exhibit A to Rubsam Affidavit—*Metropolitan Life*

STATE DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS
on the complaint of

DIANA BARABA

Complainant,

against

METROPOLITAN LIFE INSURANCE COMPANY

Respondent(s).

I, Diana Baraba, residing at 18-28 123rd Street, College Point, New York 11356, Tel. No. 463-6749, charge the above-named respondent(s) whose address(es) is (are) One Madison Avenue, New York, NY 10010, with an unlawful discriminatory practice relating to employment in violation of Article 15 of the Executive Law of the State of New York on or about February 23, 1976 because of AGE( ), RACE( ), CREED( ), COLOR( ), NATIONAL ORIGIN( ), SEX(X), DISABILITY( ), MARITAL STATUS( ), RETALIATION( ).

The particulars are:

1. I was employed by respondents for five years as a clerk.

2. On or about January 29, 1976, I became disabled due to pregnancy. I was disabled until February 23, 1976, at

which time respondents refused to pay me disability benefits.

3. On information and belief disability benefits have been paid to employees for other disabilities. I was denied these benefits as my employer refused to abide by the Court of Appeals ruling that requires such payment to a female on pregnancy disability leave.

4. I am a Female. Based on the above, I charge Metropolitan Life Insurance Company, with an unlawful discriminatory practice by denying me equal terms, conditions and privileges of employment because of my sex in violation of the New York State Human Rights Law.

I have not commenced any other civil, criminal or administrative action or proceeding in any court or administrative agency based upon the same grievance.

☐ I also charge the above-named respondent(s) with violating Title VII Civil Rights Act 1964, as amended (covers race, color, religion, sex, national origin relating to employment) and hereby authorize SDHR to accept this verified complaint on behalf of EEOC subject to the statutory limitations contained in Title VII.

.....(Sign)

Exhibit A to Rubsam Affidavit—Metropolitan Life

STATE OF NEW YORK)
COUNTY OF QUEENS) ss.:

Diana Baraba, being duly sworn, deposes and says: that he is the Complainant herein; that he has read (or had read to h) the foregoing complaint and knows the contents thereof; that the same is true of h own knowledge except as to the matters therein stated on information and belief; and that as to those matters, he believes the same to be true.

/s/ DIANA BARABA

(Signature of Complainant)

Subscribed and sworn to before me
this 8th day of February, 1977

/s/ ALMA T. WHITTAKER
ALMA T. WHITTAKER
Notary Public, State of New York
No. 41-4611756
Qualified in Queens County
Commission Expires March 10, 1977

Exhibit A to Rubsam Affidavit—Metropolitan Life

NEW YORK STATE:
EXECUTIVE DEPARTMENT

DIVISION OF HUMAN RIGHTS

Case Nos. Ia-E-S-3988-77, E-S-47960-77

DIANA BARABA,

Complainant,

vs.

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

DETERMINATION AFTER INVESTIGATION

On February 8, 1977, Diana Baraba, filed a verified complaint with the State Division of Human Rights charging the above-named respondent with an unlawful discriminatory practice relating to employment because of her sex, in violation of the Human Rights Law of the State of New York.

After investigation, the Division of Human Rights has determined that it has jurisdiction in this matter and that there is probable cause to believe that the respondent engaged in or was engaging in the unlawful discriminatory practice complained of.

Exhibit A to Rubsam Affidavit—Metropolitan Life

Pursuant to the Human Rights Law, this matter is recommended for public hearing. Parties will be advised of further proceedings.

Dated: June 1, 1977

Mailed: June 1, 1977

STATE DIVISION OF HUMAN RIGHTS

By /s/ GEORGE C. FINDLAY

George C. Findlay
Regional Director

To:

Ms. Diana Baraba
18-28 123rd Street
College Point, N.Y. 11356
Complainant

Metropolitan Life Insurance Co.
One Madison Avenue
New York, New York 10010
Respondent
Attn: Helen G. Gad, Esq.

CC:
Personnel Office

Exhibit B to Rubsam Affidavit—*Metropolitan Life*

STATE DIVISION OF HUMAN RIGHTS

Case No. ES-47960-77

STATE DIVISION OF HUMAN RIGHTS
on the complaint of

DIANE BARABA,

Complainant,

against

METROPOLITAN LIFE INSURANCE COMPANY,

Respondents.

NOTICE OF HEARING

PLEASE TAKE NOTICE, that pursuant to Section 297 of the Human Rights Law, a hearing to determine the charges of unlawful discriminatory practices alleged in the annexed verified complaint, as the same may have been amended, and all relevant issues in connection therewith, will be held before an Administrative Law Judge of the State Division of Human Rights as follows:

DATE February 15, 1980
TIME 9:30 A.M.
PLACE Room No. 5427
Address TWO WORLD TRADE CENTER
City New York, New York

THE RESPONDENT, or respondents are required to appear at the hearing and to show cause why a cease and desist order should not be issued.

Exhibit B to Rubsam Affidavit—Metropolitan Life

At Least Two Business Days prior to the hearing, the respondent shall, and any necessary party may, file an original and copy of the written answer to the complaint, sworn to subject to the penalties of perjury, in the Office of the General Counsel to the Division of Human Rights, 2 World Trade Center, Room 5386, New York, New York 10047, and serve a copy upon each of the other parties to the proceeding. The answer must contain all affirmative defenses including any defense of lack of jurisdiction. *A failure to answer shall be deemed an admission of the allegations of the complaint. If the respondent fails to answer the complaint, the Administrative Law Judge may enter the default and the hearing shall proceed on the evidence in support of the complaint.* A respondent who has filed an answer or whose default in answering has been set aside for good cause shown may appear at such hearing in person or with an attorney, cross-examine witnesses and the complainant and submit testimony. All other parties, including the complainant, shall be allowed to present testimony in person or by attorney and cross-examine witnesses.

All Parties Hereto are advised to bring to the hearing witnesses, if any, and all evidence pertinent to this matter, including books, records, papers, cards and correspondence.

No Adjournment Hereof Will Be Granted Except by Affidavit of Actual Engagement in a Higher Tribunal or for Good Cause Shown in Writing to the Chief Administrative Law Judge, Copy of the Division Attorney, No Less Than Five Days Prior to the Hearing Date. *Adjournments*

Exhibit B to Rubsam Affidavit—Metropolitan Life

Requested by Telephone Will Not Be Granted Under Any Circumstances. **Every Request for an Adjournment Must Be Accompanied by a Waiver of Any Present or Future Objection or Question that the State Division of Human Rights Has Failed to Process the Complaint in a Timely Manner.**

PLEASE TAKE FURTHER NOTICE, that if, upon all the evidence at the hearing, the Commissioner of Human Rights shall find that any or all of the respondents have engaged in an unlawful discriminatory practice as defined in the New York State Human Rights Law, the Commissioner will issue an order against such of the aforesaid respondents, as provided for by Section 297 of the New York State Human Rights Law, requiring such respondent or respondents to cease and desist from such unlawful discriminatory practice and to take such affirmative action which may include the payment of compensatory damages to the complainant.

DATED: NEW YORK, NEW YORK
January 28, 1980

STATE DIVISION OF HUMAN RIGHTS
Two World Trade Center
New York, New York 10047

Exhibit B to Rubsam Affidavit—Metropolitan Life

To:

COMPLAINANT(S)
Ms. Diana Baraba
18-28 123rd Street
College Point, New York 11356

RESPONDENT(S)
Metropolitan Life Insurance Company
One Madison Avenue
New York, New York 10010

ATTORNEY FOR COMPLAINANT(S)

ATTORNEY FOR RESPONDENT(S)
Helen G. Gad, Esq.
Metropolitan Life Insurance Company
One Madison Avenue
New York, New York 10010

ATTORNEY FOR
STATE DIVISION OF HUMAN RIGHTS
ANN THACHER ANDERSON
General Counsel
2 World Trade Center (Room 5386)
New York, New York 10047
LEONARD STECHER, ESQ., Of Counsel
Telephone Number: 212-488-6901

GEORGE S. SABLE
Chief Administrative Law Judge
2 World Trade Center (Room 5427)
New York, New York 10047
Telephone Number: 212-488-7620

Exhibit B to Rubsam Affidavit—Metropolitan Life

STATE OF NEW YORK:
EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS

Complaint No. 1a-E-S-8988-77

STATE DIVISION OF HUMAN RIGHTS
on the complaint of

DIANA BARABA

Complainant,

against

METROPOLITAN LIFE INSURANCE COMPANY

Respondent(s)

I, Diana Barbara, residing at 18-28 123rd Street, College Point, NY 11356, Tel. No. 463-6749, charge the above-named respondent(s) whose address(es) is(are) ONE MADISON AVE., NEW YORK, NY 10010 with an unlawful discriminatory practice relating to employment in violation of Article 15 of the Executive Law of the State of New York on or about February 18, 1976. Because of AGE ( ), RACE ( ), CREED ( ), COLOR ( ), NATIONAL ORIGIN ( ), SEX (X), DISABILITY ( ), MARITAL STATUS ( ), RETALIATION ( )

The particulars are:

1. I was employed by respondents as a clerk for five years.

Exhibit B to Rubsam Affidavit—Metropolitan Life

2. On September 11, 1975, I became disabled due to a pregnancy related disability. I was disabled until October 27, 1976.

3. Metropolitan Life Insurance Company rejected my claim for benefits on February 18, 1976, and I was notified of same.

4. On information and belief disability benefits have been paid to employees for other disabilities. I was denied these benefits as my employer refused to abide by the Court of Appeals ruling that requires such payment to a female on pregnancy disability leave.

5. I am a Female. Based on the above, I charge Metropolitan Life Insurance Company with discriminating against me by denying me equal terms, conditions and privileges of employment because of my sex in violation of the New York State Human Rights Law.

NOTE: Complaint received from Queens office this date 5/10/77

I have not commenced any other civil, criminal or administrative action or proceeding in any court or administrative agency based upon the same grievance.

☐ I also charge the above-named respondent(s) with violating Title VII Civil Rights Act 1964, as amended (covers race, color, religion, sex, national origin relating to employment) and hereby authorize SDHR to accept this verified complaint on behalf of EEOC subject to the statutory limitations contained in Title VII ..... (Sign)

Exhibit B to Rubsam Affidavit—Metropolitan Life

STATE OF NEW YORK)
COUNTY OF) ss:

Diana Baraba, being duly sworn, deposes and says: that she is the complainant herein; that she has read (or had read to her) the foregoing complaint and knows the content thereof; that the same is true of her own knowledge except as to the matters herein stated on information and belief; and that as to those matters, she believes the same to be true.

Subscribed and sworn to before me
on the day of , 1977

/s/ DIANA BARABA

(Signature of Complainant)

Exhibit B to Rubsam Affidavit—Metropolitan Life

STATE OF NEW YORK:
EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS

Case No. ES-47960-77

STATE DIVISION OF HUMAN RIGHTS
on the complaint of

DIANA BARABA,

Complainant,

against

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

MOTION TO DISMISS

RESPONDENT, METROPOLITAN LIFE INSURANCE COMPANY, hereby moves pursuant to 9 New York Codes of Rules and Regulations, Section 465.10(e)(3), that the Commissioner dismiss the complaint herein or, in the alternative, pursuant to 9 New York Codes of Rules and Regulations, Section 465.5(c)(1) that the regional director dismiss the complaint herein.

In support of this motion Respondent states:

(1) That complainant claims pregnancy related disability benefits from the period September 11, 1975 through October 1976;

(2) That the hearing in this matter is currently scheduled for February 15, 1980;

(3) That at all times material herein the New York State Division of Human Rights has not had jurisdiction over this claim inasmuch as the Human Rights Law, N.Y. Exec. Law §§ 290-301 (McKinney 1976) is preempted by the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001 *et seq.*) *Pervel Industries Inc.* v. *State of Connecticut Commission on Human Rights and Opportunities,* 468 F. Supp. 490 (D. Conn. 1978), *aff'd* No. 78-7604 (2d Cir., April 23, 1979), *cert denied* No. 79-107 (U.S.S.C., January 14, 1980); *Burroughs Corp.* v. *Kramarsky,* No. Civil 79-778 (W.D.N.Y., November 14, 1979); *Delta Airlines, Inc., et al* v. *Kramarsky, et al,* No. 77 Cir. 3358 (S.D.N.Y., January 28, 1980) (a copy of which is attached hereto)

WHEREFORE, Respondent prays that the complaint herein be dismissed and that the hearing be cancelled indefinitely since to compel Respondent to litigate this claim before the Human Rights Division would require Respondent to expend substantial time and expense in a proceeding where it is clear that the Human Rights Division has no jurisdiction.

Respectfully Submitted,

By /s/ GEORGE R. HORTON

George R. Horton
Attorney for Respondent
Metropolitan Life Insurance Company
One Madison Avenue
New York, N.Y. 10010
Of Counsel: Timothy J. Pauley

Exhibit B to Rubsam Affidavit—Metropolitan Life

To: George C. Findlay
Regional Director
Executive Department
Division of Human Rights
270 Broadway
New York, N. Y. 10007

Honorable George S. Sable
Chief Administrative Law Judge
2 World Trade Center (Room 5427)
New York, N. Y. 10047

Ann Thacher Anderson
General Counsel
State Division of Human Rights
2 World Trade Center (Room 5386)
New York, N. Y. 10047
Attn: Leonard Stecher

Diana Baraba
18-28 123rd Street
College Point, N. Y. 11356

Exhibit B to Rubsam Affidavit—Metropolitan Life

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Amparo Lugo, being duly sworn, deposes and states:

I am not a party to the action, am over 18 years of age and reside in 444 Second Avenue, New York, N. Y. 10010.

On February 4, 1980, I served the attached MOTION TO DISMISS upon the following:

George C. Findlay
Regional Director
Executive Department
Division of Human Rights
270 Broadway
New York, N. Y. 10007

Honorable George S. Sable
Chief Administrative Law Judge
2 World Trade Center (Room 5427)
New York, N. Y. 10047

Ann Thacher Anderson
General Counsel
State Division of Human Rights
2 World Trade Center (Room 5386)
New York, N. Y. 10047
Attn: Leonard Stecher

Diana Baraba
18-28 123rd Street
College Point, N. Y. 11356

Exhibit B to Rubsam Affidavit—Metropolitan Life

Said service was made by depositing a true copy of the attached papers enclosed in a postpaid sealed wrapper, properly addressed to the above-named in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

/s/ AMPARO LUGO

Amparo Lugo

Sworn to before me this
4th day of February, 1980.

/s/ ANTHONY C. GINETTO

Notary Public

Exhibit B to Rubsam Affidavit—Metropolitan Life

[LETTERHEAD OF]

METROPOLITAN LIFE INSURANCE COMPANY
One Madison Avenue
New York, N.Y. 10010
(212) 578-3725

GEORGE H. HORTON
Associate General Counsel

HAND DELIVERED

Honorable George S. Sable
Chief Administrative Law Judge
2 World Trade Center (Room 5427)
New York, N. Y. 10047

Re Diana Baraba v. Metropolitan Life Insurance Company Case No. ES-47960-77

Dear Mr. Sable

Enclosed herewith please find the original and two (2) copies of Respondent's REQUEST FOR POSTPONEMENT of the hearing in the above referenced matter currently set for February 15, 1980.

Very truly yours

/s/ GEORGE R. HORTON
George R. Horton
Associate General Counsel

Of Counsel: Timothy J. Pauley

February 8, 1980

GRH:al

Enclosures

Exhibit B to Rubsam Affidavit—Metropolitan Life

STATE OF NEW YORK:
EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS

Case No. ES-47960-71

STATE DIVISION OF HUMAN RIGHTS
on the complaint of

DIANA BARABA,

Complainant,

— against —

METROPOLITAN LIFE INSURANCE COMPANY,
Respondent

REQUEST FOR POSTPONEMENT

RESPONDENT, METROPOLITAN LIFE INSURANCE COMPANY, hereby requests that the hearing in this matter currently scheduled for February 15, 1980, be postponed until such time as the Commissioner has ruled upon Respondent's MOTION TO DISMISS which was filed with the Commissioner on February 4, 1980, and which, in substance, requests the Commissioner to dismiss this proceeding for lack of jurisdiction.

Respondent hereby waives, for the purpose of this proceeding and of any appeal or judicial review thereof and of any Court or administrative proceeding relating thereto, any present or future objection or question that the

Exhibit B to Rubsam Affidavit—Metropolitan Life

State Division of Human Rights has failed to process the complaint in a timely manner.

Respectfully submitted,

By /s/ GEORGE R. HORTON

George R. Horton
Attorney for Respondent
Metropolitan Life Insurance Company
One Madison Avenue
New York, N. Y. 10010

Of Counsel: Timothy J. Pauley

To: Honorable Werner H. Kramarsky,
Commissioner
Executive Department
Division of Human Rights
2 World Trade Center (Room 5308)
New York, New York 10047

Ann Thacher Anderson
General Counsel
State Division of Human Rights
2 World Trade Center (Room 5386)
New York, N. Y. 10047
Attn: Leonard Stecher

George C. Findlay
Regional Director
Executive Department
Division of Human Rights
270 Broadway
New York, N. Y. 10007

Diana Baraba
18-28 123rd Street
College Point, N. Y. 11356

Exhibit C to Rubsam Affidavit—*Metropolitan Life*

STATE OF NEW YORK:
EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS: WHITE PLAINS OFFICE

Complaint No. 1a-E-S-6373-78

STATE DIVISION OF HUMAN RIGHTS
on the complaint of

CHERYL M. PARKER

Complainant,

— against —

METROPOLITAN LIFE INSURANCE CO.

Respondent(s).

CHERYL M. PARKER residing at RD 6 Box 433A, Kingston NY 12404 Tel. NO. 914-382-1265 charges the above-named respondent(s) whose address(es) (are) ONE MADISON AVE. NEW YORK N.Y. 10010 with an unlawful discriminatory practice relating to employment in violation of Article 15 of the Executive Law of the State of Nek York on or about 5-31-77 to 1-27-78 because of RACE( ), CREED( ), COLOR( ), NATIONAL ORIGIN( ), SEX(x), DISABILITY( ), MARITAL STATUS( ), RETALIATION( )

The particulars are:

1. I am a woman. I began working for the respondent employer on or about 9-16-1968.

Exhibit C to Rubsam Affidavit—Metropolitan Life

2. Respondent has four or more employees.

3. On or about 1-4-78, I became disabled by reason of pregnancy or pregnancy related conditions. I was (will be)* able to resume my usual duties on or about (Attach medical form, if available.)

4. On information and belief, respondent has followed and applied a policy and practice of not paying fringe benefits for pregnancy-related disabilities or limiting coverage for such disabilities. On information and belief, this policy and practice constitutes an unlawful discriminatory practice of a continuing nature.

5. Pursuant to its policy and practice, respondent failed and/or refused to provide me with the benefits checked below, although it provides such benefits to male and female employees who are temporarily disabled by reason of illness or accident which is non-job related.

☐ Respondent failed to permit me to work because of my pregnancy and placed me on leave (terminated me)* on , 19 , although my physician and I determined that I was able to work.

☐ Respondent failed to permit me to use my accrued sick leave time during my period of pregnancy-related disability.

☐ Respondent failed to provide disability benefits for the period I was disabled due to pregnancy.

Exhibit C to Rubsam Affidavit—Metropolitan Life

☒ Respondent failed to provide medical, surgical, and hospital benefits for pregnancy and related conditions comparable to those provided for conditions unrelated to pregnancy.

☐ Respondent failed to re-employ me when my disability ended.

6. I therefore charge the respondent with having unlawfully discriminated against me by denying me equal terms, conditions, and privileges of employment (and terminating my employment)* because of my sex, in violation of the Human Rights Law of the State of New York. I am a woman.

STATE OF NEW YORK)
COUNTY OF ULSTER) ss:

CHERYL M. PARKER, being duly sworn, deposes and says: that she is the complainant herein; that she has read (or had read to her) the foregoing complaint and knows the content thereof; that the same is true of her own knowledge except as to the matters herein stated on information and belief; and that as to those matters, she believes the same to be true.

/s/ CHERYL M. PARKER
(Signature of Complainant)

Subscribed and sworn to before me
on the 5th day of October, 1978

/s/ NANCY PLOG
Notary Public

Exhibit C to Rubsam Affidavit—Metropolitan Life

NEW YORK STATE:
EXECUTIVE DEPARTMENT

DIVISION OF HUMAN RIGHTS

Case Nos. Ia-E-S-6373-78, E-S-60537-78

CHERYL M. PARKER
Complainant

vs.

METROPOLITAN LIFE INSURANCE COMPANY
Respondent

DETERMINATION AFTER INVESTIGATION

On October 5, 1978, Cheryl M. Parker filed a verified complaint with the State Division of Human Rights charging the above-named respondent(s) with an unlawful discriminatory practice relating to employment, because of sex in violation of the Human Rights Law of the State of New York.

After investigation, the Division of Human Rights has determined that it has jurisdiction in this matter and that there is probable cause to believe that the respondent(s) engaged in or is engaging in the unlawful discriminatory practice complained of.

Exhibit C to Rubsam Affidavit—Metropolitan Life

Pursuant to the Human Rights Law, this matter is recommended for public hearing. Parties will be advised of further proceedings.

Dated: & Mailed: June 14, 1979.

STATE DIVISION OF HUMAN RIGHTS

By GEORGE C. FINDLAY

George C. Findlay
Regional Director

To: Cheryl M. Parker
263 Hasbrouck Avenue
Kingston, New York 12401

Metropolitan Life Insurance Company
One Madison Avenue
New York, N.Y. 10010
Attn: Helen A. Grevey, Law Dept.

Exhibit D to Rubsam Affidavit—*Metropolitan Life*

STATE DIVISION OF HUMAN RIGHTS

Case No. 60537-78

STATE DIVISION OF HUMAN RIGHTS
on the complaint of

CHERYL M. PARKER,

Complainant,

— against —

METROPOLITAN LIFE INSURANCE COMPANY,

Respondents.

NOTICE OF HEARING

PLEASE TAKE NOTICE, that pursuant to Section 297 of the Human Rights Law, a hearing to determine the charges of unlawful discriminatory practices alleged in the annexed verified complaint, as the same may have been amended, and all relevant issues in connection therewith, will be held before an Administrative Law Judge of the State Division of Human Rights as follows:

DATE February 15, 1980

TIME 10:15 A.M.

PLACE Room No. 5427

Address Two World Trade Center

City New York, New York

Exhibit D to Rubsam Affidavit—Metropolitan Life

THE RESPONDENT, or respondents are required to appear at the hearing and to show cause why a cease and desist order should not be issued.

AT LEAST TWO BUSINESS DAYS prior to the hearing, the respondent shall, and any necessary party may, file an original and copy of the written answer to the complaint, sworn to subject to the penalties of perjury, in the Office of the General Counsel to the Division of Human Rights, 2 World Trade Center, Room 5386, New York, New York 10047, and serve a copy upon each of the other parties to the proceeding. The answer must contain all affirmative defenses including any defense of lack of jurisdiction. *A failure to answer shall be deemed an admission of the allegations of the complaint. If the respondent fails to answer the complaint, the Administrative Law Judge may enter the default and the hearing shall proceed on the evidence in support of the complaint.* A respondent who has filed an answer or whose default in answering has been set aside for good cause shown may appear at such hearing in person or with an attorney, cross-examine witnesses and the complainant and submit testimony. All other parties, including the complainant, shall be allowed to present testimony in person or by attorney and cross-examine witnesses.

ALL PARTIES HERETO are advised to bring to the hearing witnesses, if any, and all evidence pertinent to this matter, including books, records, papers, cards and correspondence.

NO ADJOURNMENT HEREOF will be granted except by affidavit of actual engagement in a higher tribunal or for good

cause shown in writing to the Chief Administrative Law Judge, copy to the Division Attorney, no less than five days prior to the hearing date. *Adjournments requested by telephone will not be granted under any circumstances.* Every request for an adjournment must be accompanied by a waiver of any present or future objection or question that the State Division of Human Rights has failed to process the complaint in a timely manner.

PLEASE TAKE FURTHER NOTICE, that if, upon all the evidence at the hearing, the Commissioner of Human Rights shall find that any or all of the respondents have engaged in an unlawful discriminatory practice as defined in the New York State Human Rights Law, the Commissioner will issue an order against such of the aforesaid respondents, as provided for by Section 297 of the New York State Human Rights Law, requiring such respondent or respondents to cease and desist from such unlawful discriminatory practice and to take such affirmative action as in the judgment of the Commissioner will effectuate the purposes of the Law which may include the payment of compensatory damages to the complainant.

Dated: New York, New York
January 28, 1980

STATE DIVISION OF HUMAN RIGHTS
Two World Trade Center
New York, New York 10047

Exhibit D to Rubsam Affidavit—Metropolitan Life

To:

COMPLAINANT(S)
Ms. Cheryl M. Parker
263 Hasbrouck Avenue
Kingston, New York 12401

RESPONDENT(S)
Metropolitan Life Insurance Company
One Madison Avenue
New York, New York 10010

ATTORNEY FOR COMPLAINANT(S)

ATTORNEY FOR RESPONDENT(S)
Helen A. Grevey, Esq.
Metropolitan Life Insurance Company
One Madison Avenue
New York, New York 10010

ATTORNEY FOR
STATE DIVISION OF HUMAN RIGHTS
ANN THACHER ANDERSON
General Counsel
2 World Trade Center (Room 5386)
New York, New York 10047
LEONARD STECHER, ESQ., Of Counsel
Telephone Number: 212-488-6901

GEORGE S. SABLE
Chief Administrative Law Judge
2 World Trade Center (Room 5427)
New York, New York 10047
Telephone Number: 212-488-7680

Exhibit D to Rubsam Affidavit—Metropolitan Life

STATE OF NEW YORK:
EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS
WHITE PLAINS OFFICE

Complaint No. 1a-E-S-6373-78

STATE DIVISION OF HUMAN RIGHTS
on the complaint of

CHERYL M. PARKER

Complainant,

— against —

METROPOLITAN LIFE INSURANCE CO.

Respondent(s).

CHERYL M. PARKER, residing at RD 6, Box 433A, Kingston, NY 12404, Tel. No. 914-382-1265, charges the above-named respondent(s) whose address(es) is (are) ONE MADISON AVE., NEW YORK, N.Y. 10010, with an unlawful discriminatory practice relating to employment in violation of Article 15 of the Executive Law of the State of New York on or about 5-31-77 to 1-27-78 because of RACE ( ), CREED ( ), COLOR ( ), NATIONAL ORIGIN ( ), SEX (X), DISABILITY ( ), MARITAL STATUS ( ), RETALIATION ( )

Exhibit D to Rubsam Affidavit—Metropolitan Life

The particulars are:

1. I am a woman. I began working for the respondent employer on or about 9-16-1968.

2. Respondent has four or more employees.

3. On or about 1-4-78, I became disabled by reason of pregnancy or pregnancy related conditions. I was (will be)* able to resume my usual duties on or about
(Attach medical form, if available.)

4. On information and belief, respondent has followed and applied a policy and practice of not paying fringe benefits for pregnancy-related disabilities or limiting coverage for such disabilities. On information and belief, this policy and practice constitutes an unlawful discriminatory practice of a continuing nature.

5. Pursuant to its policy and practice, respondent failed and/or refused to provide me with the benefits checked below, although it provides such benefits to male and female employees who are temporarily disabled by reason of illness or accident which is non-job related.

☐ Respondent failed to permit me to work because of my pregnancy and placed me on leave (terminated me)* on , 19 , although my physician and I determined that I was able to work.

☐ Respondent failed to permit me to use my accrued sick leave time during my period of pregnancy-related disability.

☐ Respondent failed to provide disability benefits for the period I was disabled due to pregnacy.

Exhibit D to Rubsam Affidavit—Metropolitan Life

☒ Respondent failed to provide medical, surgical, and hospital benefits for pregnancy and related conditions comparable to those provided for conditions unrelated to pregnancy.

☐ Respondent failed to re-employ me when my disability ended.

6. I therefore charge the respondent with having unlawfully discriminated against me by denying me equal terms, conditions, and privileges of employment (and terminating my employment)* because of my sex, in violation of the Human Rights Law of the State of New York. I am a woman.

STATE OF NEW YORK)
COUNTY OF ULSTER) ss:

CHERYL M. PARKER, being duly sworn, deposes and says: that she is the complainant herein; that she has read (or had read to her) the foregoing complaint and knows the content thereof; that the same is true of her own knowledge except as to the matters herein stated on information and belief; and that as to these matters, she believes the same to be true.

/s/ CHERYL M. PARKER
(Signature of Complainant)

Subscribed and sworn to before me
on the 5th day of October, 1978

/s/ NANCY PLOG
Notary Public

Exhibit D to Rubsam Affidavit—Metropolitan Life

STATE OF NEW YORK:
EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS

Case No. 60537-78

STATE DIVISION OF HUMAN RIGHTS
on the complaint of

CHERYL M. PARKER,

Complainant,

— against —

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent

MOTION TO DISMISS

RESPONDENT, METROPOLITAN LIFE INSURANCE COMPANY, hereby moves pursuant to 9 New York Codes of Rules and Regulations, Section 465.10(e)(3), that the Commissioner dismiss the complaint herein or, in the alternative, pursuant to 9 New York Codes of Rules and Regulations, Section 465.5(c)(1) that the regional director dismiss the complaint herein.

In support of this motion Respondent states:

(1) That complainant claims pregnancy related disability benefits during a period commencing January 4, 1978.

(2) That the hearing in this matter is currently scheduled for February 15, 1980;

(3) That at all times material herein the New York State Division of Human Rights has not had jurisdiction over this claim inasmuch as the Human Rights Law, N.Y. Exec. Law §§ 290-301 (McKinney 1976) is preempted by the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001 *et seq.*) *Pervel Industries Inc.* v. *State of Connecticut Commission on Human Rights and Opportunities,* 468 F. Supp. 490 (D. Conn. 1978), *aff'd* No. 78-7604 (2d Cir., April 23, 1979), *cert. denied* No. 79-107 (U.S.S.C., January 14, 1980); *Burroughs Corp.* v. *Kramarsky,* No. Civil 79-778 (W.D.N.Y., November 14, 1979); *Delta Airlines, Inc., et al* v. *Kramarsky, et al,* No. 77 Cir. 3358 (S.D.N.Y., January 28, 1980) (a copy of which is attached hereto).

WHEREFORE, Respondent prays that the complaint herein be dismissed and that the hearing be cancelled indefinitely since to compel Respondent to litigate this claim before the Human Rights Division would require Respondent to expend substantial time and expense in a proceeding where it is clear that the Human Rights Division has no jurisdiction.

By /s/ GEORGE R. HORTON

George R. Horton
Attorney for Respondent
Metropolitan Life Insurance Company
One Madison Avenue
New York, N. Y. 10010

Of Counsel: Timothy J. Pauley

Exhibit D to Rubsam Affidavit—Metropolitan Life

To: George C. Findlay
Regional Director
Executive Department
Division of Human Rights
270 Broadway
New York, N. Y. 10007

Honorable George S. Sable
Chief Administrative Law Judge
2 World Trade Center (Room 5427)
New York, N. Y. 10047

Ann Thacher Anderson
General Counsel
State Division of Human Rights
2 World Trade Center (Room 5386)
New York, N. Y. 10047
Attn: Leonard Stecher

Cheryl M. Parker
263 Hasbronck Avenue
Kingston, N. Y. 12401

Exhibit D to Rubsam Affidavit—Metropolitan Life

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK)ss:

Amparo Lugo, being duly sworn, deposes and states:

I am not a party to the action, am over 18 years of age and reside in 444 Second Avenue, New York, N. Y. 10010.

On February 4, 1980, I served the attached MOTION TO DISMISS upon the following:

George C. Findlay
Regional Director
Executive Department
Division of Human Rights
270 Broadway
New York, N. Y. 10007

Honorable George S. Sable
Chief Administrative Law Judge
2 World Trade Center (Room 5427)
New York, N. Y. 10047

Ann Thacher Anderson
General Counsel
State Division of Human Rights
2 World Trade Center (Room 5386)
New York, N. Y. 10047
Attn: Leonard Stecher

Cheryl M. Parker
263 Hasbronck Avenue
Kingston, N. Y. 12401

Exhibit D to Rubsam Affidavit—Metropolitan Life

Said service was made by depositing a true copy of the attached papers enclosed in a postpaid sealed wrapper, properly addressed to the above-named in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

/s/ Amparo Lugo

Amparo Lugo

Sworn to before me this
4th day of February, 1980.

Anthony C. Ginetto

Notary Public

Exhibit D to Rubsam Affidavit—Metropolitan Life

Metropolitan Life Insurance Company
One Madison Avenue
New York, N.Y. 10010
(212) 578-3725

GEORGE R. HORTON
Associate General Counsel

HAND DELIVERED

Honorable George S. Sable
Chief Administrative Law Judge
2 World Trade Center (Room 5427)
New York, N. Y. 10047

Re Cheryl M. Parker v. Metropolitan Life Insurance Company Case No. 60537-78

Dear Mr. Sable

Enclosed herewith please find the original and two (2) copies of Respondent's REQUEST FOR POSTPONEMENT of the hearing in the above referenced matter currently set for February 15, 1980.

Very truly yours

/s/ GEORGE R. HORTON
George R. Horton
Associate General Counsel

Of Counsel: Timothy J. Pauley

February 8, 1980

GRH:al

Enclosures

Exhibit D to Rubsam Affidavit—Metropolitan Life

STATE OF NEW YORK:
EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS

Case No. 60537-78

STATE DIVISION OF HUMAN RIGHTS
on the complaint of

CHERYL M. PARKER,

Complainant,

— against —

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

REQUEST FOR POSTPONEMENT

RESPONDENT, METROPOLITAN LIFE INSURANCE COMPANY, hereby requests that the hearing in this matter currently scheduled for February 15, 1980, be postponed until such time as the Commissioner has ruled upon Respondent's MOTION TO DISMISS which was filed with the Commissioner on February 4, 1980, and which, in substance, requests the Commissioner to dismiss this proceeding for lack of jurisdiction.

Respondent hereby waives, for the purpose of this proceeding and of any appeal or judicial review thereof and of any Court or administrative proceeding relating thereto,

any present or future objection or question that the State Division of Human Rights has failed to process the complaint in a timely manner.

Respectfully Submitted,

By /s/ GEORGE R. HORTON

George R. Horton
Attorney for Respondent
Metropolitan Life Insurance Company
One Madison Avenue
New York, N. Y. 10010

Of Counsel: Timothy J. Pauley

To: Honorable Werner H. Kramarsky,
Commissioner
Executive Department
Division of Human Rights
2 World Trade Center (Room 5308)
New York, New York 10047

Ann Thacher Anderson
General Counsel
State Division of Human Rights
2 World Trade Center (Room 5386)
New York, N. Y. 10047
Attn: Leonard Stecher

George C. Findlay
Regional Director
Executive Department
Division of Human Rights
270 Broadway
New York, N. Y. 10007

Cheryl M. Parker
263 Hasbronck Avenue
Kingston, N. Y. 12401

Exhibit E to Rubsam Affidavit—*Metropolitan Life*

STATE OF NEW YORK
EXECUTIVE DEPARTMENT

DIVISION OF HUMAN RIGHTS

30 Glenn Street, Rm. 310,
White Plains, N.Y. 10603
WH 9-4394

September 26, 1977

Metropolitan Life Insurance Company
Kingston, N.Y. Data Center
Clinton Ave. Ext.
Kingston, N.Y. 12401

Re: Jean M. Osborne vs.
Metropolitan Life Insurance Company
Case No. III-E-S-2883-77

Gentlemen:

Enclosed is a copy of a complaint which has been filed against the above-named respondent.

Very truly yours,

/s/ HARRY ANDERSON
Harry Anderson
Regional Director

HA/md
Enc
cc: Mertopolitan Life Insurance Company
One Madison Ave., New York, N.Y. 10010

Exhibit E to Rubsam Affidavit—Metropolitan Life

STATE OF NEW YORK:
EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS
WHITE PLAINS OFFICE

Complaint No. III-E-S-2883-77

STATE DIVISION OF HUMAN RIGHTS
on the complaint of

JEAN M. OSBORNE

Complainant,

— against —

METROPOLITAN LIFE INSURANCE CO.

Respondent(s).

I, Jean M. Osborne residing at AT2 Olivebridge, New York Tel. No. 914-657-6376 charge the above-named respondent(s) whose address(es) (are) Met. Life Ins. Co. Kington, NY DATA CENTER CLINTON AVE. E.T. KINGSTON, NY Met. Life Ins. Co. ONE MADISON AVE, NEW YORK, N.Y. 10010 with an unlawful discriminatory practice relating to employment in violation of Article 15 of the Executive Law of the State of New York on or about 5-22-77 to 7-18-77 because of RACE( ), CREED( ), COLOR( ), NATIONAL ORIGIN( ), SEX(X), DISABILITY( ), MARITAL STATUS( ), RETALIATION( )

Exhibit E to Rubsam Affidavit—Metropolitan Life

The particulars are:

1. I am a woman. I began working for the respondent employer on or about Feb. 1970.

2. Respondent has four or more employees.

3. On or about 5-22-77, I became disabled by reason of pregnancy or pregnancy related conditions. I was (will be)* able to resume my usual duties on or about 7-18-77. (Attach medical form, if available.)

4. On information and belief, respondent has followed and applied a policy and practice of not paying fringe benefits for pregnancy-related disabilities or limiting coverage for such disabilities. On information and belief, this policy and practice constitutes an unlawful discriminatory practice of a continuing nature.

5. Pursuant to its policy and practice, respondent failed and/or refused to provide me with the benefits checked below, although it provides such benefits to male and female employees who are temporarily disabled by reason of illness or accident which is non-job related.

☐ Respondent failed to permit me to work because of my pregnancy and placed me on leave (terminated me)* on , 19 , although my physician and I determined that I was able to work.

☒ Respondent failed to provide disability benefits for the period I was disabled due to pregnancy.

☐ Respondent failed to permit me to use my accrued sick leave time during my period of pregnancy-related disability.

Exhibit E to Rubsam Affidavit—Metropolitan Life

☐ Respondent failed to provide medical, surgical, and hospital benefits for pregnancy and related conditions comparable to those provded for conditions unrelated to pregnancy.

☐ Respondent failed to re-employ me when my disabilty ended.

6. I therefore charge the respondent with having unlawfully discriminated against me by denying me equal terms, conditions, and privileges of employment (and terminating my employment)* because of my sex, in violation of the Human Rights Law of the State of New York. I am a woman.

STATE OF NEW YORK)
COUNTY OF ULSTER) ss:

Jean M. Osborne, being duly sworn, deposes and says: that she is the complainant herein, that she has read (or had read to her) the foregoing complaint and knows the content thereof; that the same is true of her own knowledge except as to the matters herein stated on information and belief; and that as to those matters, she believes the same to be true.

/s/ JEAN M. OSBORNE

(Signature of Complainant)

Subscribed and sworn to before me
on the 12th day of August, 1977

/s/ EILEEN R. BAKER

Notary Public

Exhibit E to Rubsam Affidavit—Metropolitan Life

STATE OF NEW YORK:
EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS

Case No. ES-52509-77

STATE DIVISION OF HUMAN RIGHTS
on the complaint of

JEAN OSBORNE,

Complainant,

— against —

METROPOLITAN LIFE INSURANCE COMPANY,
Respondent.

NOTICE OF RECOMMENDED FINDINGS OF FACT, DECISION AND ORDER

PROCEEDINGS IN THE CASE

On the 22nd day of August, 1977, the above-named Complainant filed a verified complaint, as thereafter amended, with the State Division of Human Rights (hereinafter the "Division") charging the above-named Respondent with an unlawful discriminatory practice relating to employment, in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in an unlawful

discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Samuel A. Diamond, Esq., a Hearing Examiner of the Division. Hearings were held on July 12, 1978 and June 20, 1979.

At the hearings, Complainant did not appear at the first hearing but did appear at the second. Respondent appeared at both hearings and was represented by Helen G. Gad, Esq. and by Walter J. Shipman, Esq. The Division was represented by Ann Thacher Anderson, General Counsel, by Leonard Stecher, Esq., the Division's attorney. Briefs which were submitted on behalf of the Division and on behalf of Respondent were considered.

Findings of Fact

1. Complainant is a woman and was employed by Respondent from February, 1970 to date.

2. Respondent employs four or more employees in the State of New York.

3. Respondent provided the following fringe benefits to employees disabled by non-occupational illness or injury: benefits under its own plan or pursuant to an agreement with its employees or their bargaining agent.

4. Complainant became unable to continue at her job because of disability related to pregnancy on May 22, 1977, and continued to be disabled through July 17, 1977.

Exhibit E to Rubsam Affidavit—Metropolitan Life

5. At the time stated in paragraph 4, Respondent did not provide fringe benefits to employees disabled by pregnancy, childbirth, miscarriage, abortion, complications thereof or recuperation therefrom.

6. At the time such disability began, Complainant worked as a Junior Clerk and earned $149.50 weekly.

7. Prior to the first scheduled hearing Complainant, by letter, advised the Division that Respondent had paid her for her disability claim and she had no further need to continue with her complaint for disability. However, Complainant wished to continue her claim for medical benefits.

8. Complainant was hospitalized in connection with her pregnancy. On May 23, 1977, her child was delivered by Cesaerian Section. Her medical bills totalled $2,424.70.

9. Respondent paid Complainant $900 in connection with her claim for reimbursement for medical. This was the maximum amount payable under the plan in effect at that time with respect to maternity benefits. No similar limitations were established by the plan with respect to expenses unrelated to pregnancy.

The plan in effect at the time (now altered) provided for payment in full of certain medical expenses (see Type A and Type B Covered Medical Expense as set forth in Respondent's "Comprehensive Medical Expense Insurance" received in evidence as Complainant's Exhibit #3 pages 5, 6 and 7) but provided specific dollar amount limitations for maternity benefits (see page 10 of Exhibit #3).

Exhibit E to Rabsam Affidavit—Metropolitan Life

10. I find that Respondent discriminated against Complainant, because of sex, by disallowing to her, reimbursement for medical expenses incurred for the period of a medically certified disability connected with pregnancy, the fringe benefits provided by Respondent for employees disabled by non-occupational injury or illness.

11. I find that Respondent discriminated against its female employees generally, because of sex, by failing to provide reimbursement for medical expenses incurred for periods of disability related to pregnancy, fringe benefits equivalent to those provided by Respondent for employees disabled by non-occupational injury or illness.

DECISION

It has been urged on behalf of the Division that a discriminatory practice has been established by the difference in treatment under Respondent's Plan, between medical expenses received by females in connection with maternity and other medical expenses incurred by employees not related to maternity. In the one case a dollar limitation ($900) is provided. However, no such limitation has been provided with respect to Type A or Type B Covered Medical Expenses. In such cases reimbursement was provided for on the basis of 100% or 80% of the amount involved.

In my opinion there is merit to the Division's position. I consider the authority cited in support of that position to be applicable and controlling. *In the Matter of the New York State Department of Civil Service* v. *New York State Human Rights Appeal Board, et al*, 66 A.D.2d 309.

Exhibit E to Rubsam Affidavit—Metropolitan Life

On the basis of the foregoing, I find that Respondent discriminated against Complainant, because of sex, in terms, conditions or privileges of employment, in violation of the Human Rights Law.

On the basis of the foregoing, I find that Respondent discriminated against female employees generally, because of sex, in terms, conditions and privileges of employment, in violation of the Human Rights Law.

On the basis of the foregoing, I find that an award of compensatory damages to the aggrieved Complainant will effectuate the purposes of the Human Rights Law.

ORDER

On the foregoing Findings of Fact, and pursuant to the Human Rights Law, it is hereby

ORDERED:

Respondent, its agents, representatives, employees, successors and assigns shall cease and desist from discriminating against any employee or individual, because of sex, in terms, conditions or privileges of employment and shall take the following affirmative action to effectuate the purposes of the Human Rights Law:

1. Within 30 days from the date of this Order (or any Order affirming, sustaining or enforcing this Order) pay the Complainant $1,524.70 with interest at 6% from August 22, 1977, and resore to her all rights, benefits and privileges to which she would have been entitled if she had received fringe benefits from Respondent during the medically certified period of pregnancy-related disability.

2. Identify other employees affected by Respondent's unlawful discriminatory practice at any time since the date preceding by one year the filing of the complaint, and pay them what they would have received if Respondent had provided, for employees disabled in some way connected with pregnancy, terms, conditions and privileges of employment equivalent to what it provided for employees disabled by non-occupational injury or illness.

3. Within 30 days from the date of this Order (or any Order affirming, sustaining or enforcing this Order), submit a written report to the Compliance Investigation Unit of this Division at 2 World Trade Center, New York, NY 10047, setting forth everything done to comply with this Order, and attaching documentary proof.

Dated: New York, New York
January 17, 1980.

STATE DIVISION OF HUMAN RIGHTS

/s/ SAMUEL A. DIAMOND

Hearing Examiner

Exhibit F to Rubsam Affidavit—*Metropolitan Life*

STATE OF NEW YORK:
EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS

Complaint No. IIA-E-S-1211-77

STATE DIVISION OF HUMAN RIGHTS
on the complaint of

MARIE ANN SPEZIA

Complainant,

— against —

METROPOLITAN LIFE INS. CO.

Respondent(s)

I, Marie Anne Spezia residing at 21 Maryland Ave. Bay Shore, NY Tel. 666-2497 charge the above-named respondent(s) whose address(es) is (are) Metropolitan Life Ins. Co 330 Vanderbuilt Motor Pkwy Hauppauge, LI, NY with an unlawful discriminatory practice relating to Employment in violation of Article 15 of the Executive Law of the State of New York on or about ..... because of AGE( ), RACE( ), CREED( ), COLOR( ), NATIONAL ORIGIN( ), SEX(√), RETALIATION( )

Exhibit F to Rubsam Affidavit—Metropolitan Life

The particulars are:

1. I was employed by Metropolitan Life Ins. Co. since *8/20/73* as a *Claims Approver*
2. I left on *May 6, 1977* because of a pregnancy-related disability. I delivered my child on————
3. I applied for disability coverage on May 6, 1977 and was rejected on May 18, 1977 and was told that disability due to pregnancy is excluded by the Disability Benefits Law. This responsibility has been imposed upon employers by the Human Rights Law.
4. On information and belief men's temporary physical disabilities are covered by health benefits.
5. I am a woman and based on the foregoing I charge the above named respondent(s) with discrimination in violation of Article 15 of the Executive Law of the State of New York.

I have not commenced any other civil, criminal or administrative action or proceeding in any court or administrative agency based upon the same grievance.

I also charge the above-named respondent(s) with violating Title VII Civil Rights Act 1964, as amended (covers race, color, religion, sex, national origin relating to employment) and hereby authorize SDHR to accept this verified complaint on behalf of EEOC subject to the statutory limitations contained in Title VII .....(Sign)

Exhibit F to Rubsam Affidavit—Metropolitan Life

STATE OF NEW YORK)
COUNTY OF SUFFOLK) ss:

..... being duly sworn, deposes and says: that she is the Complainant herein; that he has read the foregoing complaint and knows the concern thereof; that the same is true of her own knowledge except as to the matters therein stated on information and belief; and that as to those matters she believed the same to be true.

/s/ Marie Anne Spezia

.....

Subscribed and sworn to before me
this 22 day of May, 1977

/s/ RAYMOND CONNOR

Notary Public

Exhibit F to Rubsam Affidavit—Metropolitan Life

STATE OF NEW YORK
EXECUTIVE DEPARTMENT

DIVISION OF HUMAN RIGHTS
Two World Trade Center
New York, New York 10047

September 26, 1979

Re: Marie Ann Spezia v. Metropolitan Life Ins. Co.
Case No. ES-51470-77

TO THE PARTIES LISTED BELOW:

Attached herewith is a copy of the report to the Commission. You have twenty-one (21) days after service to file objections which should be addressed to the State Division of Human Rights, Office of the Commissioner, Two World Trade Center, New York, New York 10047. Your objections may be in letter form, should not reargue material in the record and should be as concise as possible.

Very truly yours,

/s/
SAM SINGER
Hearing Examiner

Attachment

Exhibit F to Rubsam Affidavit—Metropolitan Life

To: Ms. Marie Ann Spezia
21 Maryland Avenue
Bayshore, New York

Metropolitan Life Ins. Co.
Company Law Dept.
1 Madison Avenue
New York, New York 10010
Att: Helen Grevey, Esq.

Ann Thacher Anderson
General Counsel
State Division of Human Rights
2 World Trade Center
New York, New York 10047
Attention: Robert Marx

Exhibit F to Rubsam Affidavit—Metropolitan Life

STATE OF NEW YORK:
EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS

Case No. ES-51470-77

STATE DIVISION OF HUMAN RIGHTS
on the complaint of

MARIE ANNE SPEZIA,

Complainant,

— against —

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

NOTICE OF RECOMMENDED FINDINGS OF FACT, DECISION AND ORDER

PROCEEDINGS IN THE CASE

On the 22nd day of July, 1977, the above-named Complainant filed a verified complaint, as thereafter amended, with the State Division of Human Rights (hereinafter the "Division") charging the above-named Respondent with an unlawful discriminatory practice relating to employment, in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed

to believe that Respondent had engaged in an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Samuel A. Diamond, Esq., a Hearing Examiner of the Division. The hearing was held on February 1, 1979.

At the hearing, the Complainant appeared. Respondent appeared and was represented by Helen Grevey, Esq. The Division was represented by Ann Thacher Anderson, General Counsel, by Robert Marx, Esq., the Division's attorney.

Findings of Fact

1. Complainant is a woman and was employed by Respondent from 1970 to May 6, 1977.

2. Respondent employs four or more employees in the State of New York.

3. Respondent provided the following fringe benefits to employees disabled by non-occupational injury or illness: benefits under its own plan or pursuant to an agreement with its employees or their bargaining agent.

4. Complainant became unable to continue at her job because of disability related to pregnancy on May 6, 1977, and continued to be disabled through December 25, 1977.

5. At the time stated in paragraph 4, Respondent did not provide full fringe benefits to employees disabled by pregnancy, childbirth, miscarriage, abortion, complications thereof or recuperation therefrom.

6. At the time such disability began, Complainant worked as a Claims Approver and earned $163 weekly.

7. Respondent did not provide to Complainant, during the medically certified period of disability, full fringe benefits in Finding of Fact No. 3.

8. I find that Respondent discriminated against Complainant, because of sex, by disallowing to her, for the period of a medically certified disability connected with pregnancy, the fringe benefits provided by Respondent for employees disabled by non-occupational injury or illness.

9. I find that Respondent discriminated against its female employees generally, because of sex, by failing to provide for periods of disability related to pregnancy, fringe benefits equivalent to those provided by Respondent for employees disabled by non-occupational injury or illness.

10. Pursuant to its company plan Respondent did pay Complainant's salary for a total of eight weeks. The first week was salary continuance, the next seven weeks were for disability related to pregnancy. Respondent disputed that Complainant was disabled for a longer period.

Decision

On the basis of the foregoing, I find that Respondent discriminated against Complainant, because of sex, in terms, conditions or privilages of employment, in violation of the Human Rights Law.

On the basis of the foregoing, I find that Respondent discriminated against female employees generally, because

of sex, in terms, conditions and privileges of employment, in violation of the Human Rights Law.

On the basis of the foregoing, I find that an award of compensatory damages to the aggrieved Complainant will effectuate the purposes of the Human Rights Law.

ORDER

On the foregoing Findings of Fact, and pursuant to the Human Rights Law, it is hereby

ORDERED:

Respondent, its agents, representatives, employees, successors and assigns shall cease and desist from discriminating against any employee or individual, because of sex, in terms, conditions and privileges of employment and shall take the following affirmative action to effectuate the purposes of the Human Rights Law:

1. Within 30 days from the date of this Order (or any Order affirming, sustaining or enforcing this Order) pay the Complainant $1,303.92 with interest at 6% from July 17, 1977 and restore to her all rights, benefits and privileges to which she would have been entitled if she had received fringe benefits from Respondent during the medically certified periods of pregnancy-related disability.

2. Identify other employees affected by Respondent's unlawful discriminatory practice at any time since the date preceding by one year the filing of the complaint, and pay

them what they would have receievd if Respondent had provided, for employees disabled in some way connected with pregnancy, terms, conditions and privileges of employment equivalent to what it provided for employees disabled by non-occupational injury or illness.

3. The said Respondent, in respect to paragraph 1 and 2 shall furnish proof of compliance within ten (10) business days thereof to the State Division of Human Rights, 2 World Trade Center, New York, NY 10047, Attention: Esq., Legal Bureau.

Dated: New York, New York
September 13, 1979.

STATE DIVISION OF HUMAN RIGHTS

/s/ SAMUEL A. DIAMOND

Hearing Examiner

Exhibit F to Rubsam Affidavit—Metropolitan Life

STATE OF NEW YORK:
EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS

Case No.(s) ES-51470-77

STATE DIVISION OF HUMAN RIGHTS
on the complaint(s) of

MARIE ANNE SPEZIA,

Complainant,

against

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

NOTICE OF ORDER AFTER HEARING

PLEASE TAKE NOTICE that the within is a true copy of an Order issued herein by Werner H. Kramarsky, Commissioner of the State Division of Human Rights, after a hearing held before Administrative Law Judge Samuel A. Diamond, Esq. In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at 2 World Trade Center, New York, New York 10047. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that in accordance with Section 297-a of the New York State Human Rights Law, any party to this proceeding may appeal this Order to the State Human Rights Appeal Board by filing with the

Board a written notice of appeal within fifteen (15) days after service of this Order. The notice of appeal must be filed by mail or in person at the office of the State Human Rights Appeal Board, Room 8234, 2 World Trade Center, New York, New York 10047. DO NOT FILE THE NOTICE OF APPEAL WITH THE STATE DIVISION OF HUMAN RIGHTS. The Division and the Board are separate agencies. A notice of appeal delivered to or received by the Division, or any agency other than the Board, shall be deemed improperly filed and shall be dismissed by the Board.

Dated: Nov 27 1979
New York, New York

STATE DIVISION OF HUMAN RIGHTS

/s/ WERNER H. KRAMARSKY

Werner H. Kramarsky
Commissioner

To:

Ms. Marie Anne Spezia
21Maryland Avenue
Bayshore, New York

Metropolitan Life Insurance Company
Law Department
One Madison Avenue
New York, New York 10010
Attention Helen Grevey, Esq.

Ann Thacher Anderson, Esq., General Counsel
State Division of Human Rights
2 World Trade Center
New York, New York 10047
Attention Robert Marx, Esq.

Hon. Robert Abrams
Attorney General
2 World Trade Center
New York, New York 10047

Exhibit F to Rubsam Affidavit—Metropolitan Life

STATE OF NEW YORK:
EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS

Case No.(s) ES-51470-77

STATE DIVISION OF HUMAN RIGHTS
on the complaint(s) of

MARIE ANNE SPEZIA,

Complainant,

— against —

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

PROCEEDINGS IN THE CASE

On the 22nd day of July, 1977, the above-named Complainant filed a verified complaint with the State Division of Human Rights (hereinafter the "Division") charging the above-named Respondent with an unlawful discriminatory practice relating to employment, in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

Exhibit F to Rubsam Affidavit—Metropolitan Life

After due notice, the case came on for hearing before Samuel A. Diamond, Esq., an Administrative Law Judge of the Division. The hearing was held on February 1, 1979 and June 8, 1979.

At the hearing, the Complainant appeared. Respondent appeared and was represented by Helen Grevey, Esq. The Division was represented by Ann Thacher Anderson, General Counsel, by Robert Marx, Esq., the Division's attorney.

FINDINGS OF FACT

1. Complainant is a woman and was employed by Respondent from 1970 to May 6, 1977, with one interruption.

2. Respondent employs four or more employees in the State of New York.

3. Respondent provided the following fringe benefits to employees disabled by non-occupational injury or illness: benefits under its own plan or pursuant to an agreement with its employees or their bargaining agent, which provided for disability benefits of two-thirds of the weekly salary.

4. Complainant became unable to continue at her job because of disability related to pregnancy on May 6, 1977, and continued to be disabled through September 6, 1977, a period of 17 weeks and 5 days.

5. Until it changed its policy after Complainant's claim, Respondent did not provide full fringe benefits to employees disabled by pregnancy, childbirth, miscarriage,

abortion, complications thereof or recuperation therefrom. Respondent paid Complainant accrued vacation pay covering the period May 6 to May 20, 1977.

6. At the time such disability began, Complainant worked as a Claims Approver and earned $163 weekly.

7. Respondent did not provide to Complainant, during the medically certified period of disability, the full fringe benefits mentioned in Finding of Fact No. 3.

8. I find that Respondent discriminated against Complainant, because of sex, by disallowing to her, for the period of a medically certified disability connected with pregnancy, the full fringe benefits provided by Respondent for employees disabled by non-occupational injury or illness.

9. I find that Respondent discriminated against its female employees generally, because of sex, by failing to provide for periods of disability related to pregnancy, fringe benefits equivalent to those provided by Respondent for employees disabled by non-occupational injury or illness.

10. Pursuant to its company plan, Respondent did pay Complainant for a total of eight weeks. The first week was salary continuance, the next seven weeks were for disability benefits for a disability related to pregnancy. Respondent disputed that Complainant was disabled for a longer period.

Exhibit F to Rubsam Affidavit—Metropolitan Life

OPINION

As Complainant was disabled for 17 full weeks, she was entitled to 16 weeks of disability benefits at the rate of $108.67 per week. She was paid only 7 weeks of disability benefits. Therefore, she was underpaid $978.03 for 9 weeks. Although she did receive vacation pay covering two of the weeks she was disabled, such pay was owing to her anyway.

DECISION

On the basis of the foregoing, I find that Respondent discriminated against Complainant, because of sex, in terms, conditions and privileges of employment, in violation of the Human Rights Law.

On the basis of the foregoing, I find that Respondent discriminated against female employees generally, because of sex, in terms, conditions and privileges of employment, in violation of the Human Rights Law.

On the basis of the foregoing, I find that an award of compensatory damages to the aggrieved Complainant will effectuate the purposes of the Human Rights Law.

ORDER

On the foregoing Findings of Fact, and pursuant to the Human Rights Law, it is hereby

ORDERED, that Respondent, its agents, representatives, employees, successors and assigns shall cease and desist from discriminating against any employee or individual, because of sex, in terms, conditions and privileges of em-

ployment and shall take the following affirmative action to effectuate the purpose of the Human Rights Law:

1. Within thirty (30) days from the date of this Order (or any Order affirming, sustaining or enforcing this Order) pay the Complainant $978.03 with interest at six percent (6%) from July 17, 1977, a reasonable intermediate date, and restore to her all rights, benefits and privileges to which she would have been entitled if she had received fringe benefits from Respondent during the medically certified period of pregnancy-related disability.

2. The said Respondent, in respect to paragraph 1, shall furnish proof of compliance within ten (10) business days thereof to the State Division of Human Rights, 2 World Trade Center, New York, New York 10047, Attention Legal Bureau.

Dated: Nov. 27, 1979
New York, New York

STATE DIVISION OF HUMAN RIGHTS

/s/ WERNER H. KRAMARSKY

Commissioner

Exhibit F to Rubsam Affidavit—Metropolitan Life

STATE OF NEW YORK:
EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS

Case No. ES-51470-77

STATE DIVISION OF HUMAN RIGHTS
on the complaint of

MARIE ANNE SPEZIA,

Complainant,

— against —

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

NOTICE OF APPEAL

SIRS:

PLEASE TAKE NOTICE that the respondent, METROPOLITAN LIFE INSURANCE COMPANY, hereby appeals to the New York State Human Rights Appeal Board from the order of Werner H. Kramarsky, Commissioner of the State Division of Human Rights, in the above captioned matter, dated November 27, 1979, and served upon the respondent by mail on November 29, 1979.

Dated: New York, New York
December 13, 1979

By /s/

George R. Horton
Attorney for Respondent
Metropolitan Life Insurance Company
One Madison Avenue
New York, New York 10010

Exhibit F to Rubsam Affidavit—Metropolitan Life

To: New York State Human Rights Appeal Board
Two World Trade Center
New York, New York 10047

Marie Anne Spezia
21 Maryland Avenue
Bayshore, New York

Ann Thacher Anderson, Esq.
General Counsel
State Division of Human Rights
Two World Trade Center
New York, New York 10047
Att: Robert Marx, Esq.

Exhibit F to Rubsam Affidavit—Metropolitan Life

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Rosemarie Vorisch, being duly sworn, deposes and states:

I am not a party to the action, am over 18 years of age, and reside in 1151 50th Street, North Bergen, New Jersey 07047

On December 13, 1979, I served the attached NOTICE OF APPEAL upon the following:

Ann Thacher Anderson, Esq., General Counsel
State Division of Human Rights
2 World Trade Center
New York, N. Y. 10047
Attn: Robert Marx, Esq.

Marie Anne Spezia
21 Maryland Avenue
Bayshore, New York

Said service was made by depositing a true copy of the attached papers enclosed in a postpaid sealed wrapper, properly addressed to the above-named in an official depository under the exclusive care and custody of the United States Post Office within the State of New York

/s/
Rosemarie Vorisch

Sworn to before me this
13th day of December, 1979.

/s/ ANTHONY C. GINETTO
Notary Public

Transcript of Proceedings, District Court, February 14, 1980—*Metropolitan Life Insurance Company* v. *Kramarsky*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

80 Civ. 860

METROPOLITAN LIFE INSURANCE COMPANY,
Plaintiff,

v.

WERNER H. KRAMARSKY, *et al.*,
Defendants.

February 14, 1980

BEFORE:

HON. WHITMAN KNAPP,
District Judge

APPEARANCES:

Proskauer, Rose, Goetz & Mendelsohn, Esqs.,
Attorneys for Plaintiff
Jeffrey A. Mishkin, Esq., and
Sara S. Portnoy, Esq., of Counsel
— and —
William G. Pappas, Esq.

David C. King, Esq.,
State Division of Human Rights

Judith Kramer, Esq.,
Assistant Attorney General,
State of New York

The Court: Who would like to state what the facts are?

Mr. Mishkin: I will, your Honor.

There are now pending before the New York State Division of Human Rights, and in one instance the New York State Human Rights Appeal Board, proceedings in which employees or former employees of Metropolitan Life Insurance Company charge Metropolitan with sex discrimination under the New York Human Rights Law for failure to pay disability or medical expense benefits under the various employee benefit plans maintained by Metropolitan.

Those plans are covered by and regulated by the Federal Act known as Erisa.

The Court: That's your contention.

Mr. Mishkin: Yes, your Honor, that is our contention, and I don't believe it has been disputed.

Those, I think, are the pertinent facts.

Our legal position is that under controlling authority in this circuit, the case of Pervel against the State of Connecticut Commission on Human Rights, Erisa preempts and supersedes the New York State Human Rights Law and any administrative proceedings under that law in so far as they relate to employee benefit plans covered by Erisa, and this case in our view is on all fours with Pervel, and the proceedings ought to be enjoined.

The Court: You may put your position on the record.

Mr. King: The position of the State Division of Human Rights—

The Court: And all the other defendants?

Mr. King: I can only speak for the Division, your Honor.

The Court: I take it you authorize him to speak for you.

Ms. Kramer: I don't represent any of the defendants.

Mr. King: I have just been authorized to also speak for the State Human Rights Appeal Board.

The position of the two state agencies is that the New York State Human Rights Law, which is the State Fair Employment Act, mandates that equal benefits be provided to employees regardless of sex.

It is the position of the two agencies that the State Human Rights Law is not superseded by Erisa in that the State Human Rights Law does not mandate as to what the specific substantive benefits to be provided by the plans are. It is the position of these agencies that the Pervel decision does not apply, and that the Pervel decision was an interpretation of the Connecticut statute which mandated substantively as to which benefits were to be provided by the plans in the State of Connecticut.

The State Division of Human Rights has never ordered as to substantive benefits to be provided in a plan. We have never ordered that a plan be amended to comply with the mandates of the State Human Rights Law in any hearings and orders after hearing that have been generated based on alleged acts of discrimination, based on sex, because of a woman's pregnancy.

The Division has awarded compensatory damages based on sex discrimination with the possibility the Commissioner could always in an appropriate case also award mental anguish and humiliation damages, or no damages.

The Court: How can no damages be awarded in a situation he took the position there was sex discrimination?

Mr. King: The Commission could order various public interest language. The Commission could order prospective public relief but nothing to the complainant.

The Court: Has he ever done any such thing?

Mr. King: Yes. He found prospective public interest relief but nothing for the complainant.

The Court: That seems hard on the woman.

Mr. King: That's at the discretion of the Commissioner.

There is no final determination whether or not Erisa supersedes state fair employment compensation. The Division feels that the Supreme Court's refusal to reverse decisions out of the state system based exactly on this issue would lead one to believe that the Supreme Court did not feel these cases had been decided incorrectly and that therefore the New York law like the Wisconsin law is not superseded by Erisa.

The Court: Is there anything else anybody wants to add?

I don't think any detailed findings by me are in order. It is my view that I am controlled by the Second Circuit decision which has been mentioned, and let the plaintiff submit an order sometime today, show it to the other side, and I will sign it so we can get an expedited appeal. As I understand there is an appeal pending in the Western District, and the two probably will be consolidated. Remember, I don't enjoin proceedings, I just enjoin prosecution proceedings, when you frame your order.

Mr. Mishkin: All right, your Honor. We will draft it carefully.

Motion to Dismiss or Affirm

1

Supreme Court, U.S.
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No. 81-1578

IN THE
Supreme Court of the United States

WERNER J. KRAMARSKY, *et al.*,
Appellants,

v.

DELTA AIR LINES, INC., *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

MOTION OF APPELLEE AIRLINES TO AFFIRM OR DISMISS

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
THE COURT OF APPEALS CORRECTLY HELD THAT ERISA PREEMPTS THE NEW YORK HRL	2
THE COURT OF APPEALS CORRECTLY HELD THAT ERISA PREEMPTS THE NEW YORK DBL	4
NEW YORK'S APPEAL PRESENTS QUESTIONS OF HISTORICAL SIGNIFICANCE ONLY	5
CONCLUSION	6

TABLE OF AUTHORITIES

CASES: Page

Alessi v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) 2, 4, 5

General Electric Co. v. *Gilbert*, 429 U.S. 125 (1976) 1

Pervel Industries, Inc. v. *Connecticut Commission on Human Rights*, 468 F. Supp. 490 (D. Conn. 1978), aff'd mem., 603 F.2d 214 (2d Cir. 1979), cert. denied, 444 U.S. 1031 (1980) 3

STATUTES

Federal:

Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq. 2, 3, 4, 5

29 U.S.C. § 1003(b) 2

29 U.S.C. § 1003(b)(3) 4

29 U.S.C. § 1144(a) 2

29 U.S.C. § 1144(b)(2)(A) 3

29 U.S.C. § 1144(b)(4) 4

29 U.S.C. § 1144(d) 2

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e - 2000e-17 ..... 2, 3, 4

42 U.S.C. § 2000e(k) 4

42 U.S.C. § 2000e-7 2

State:

Cal. Gov't Code § 12940 (1980) 3

D.C. Code § 211(a)(1978) 3

Minn. Stat. § 363.03 (1980) 3

RULE:

Rule 16 of the Supreme Court 2

MISCELLANEOUS:

120 Cong. Rec. 29,933 (1974) 3

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MOTION OF APPELLEE AIRLINES TO AFFIRM OR DISMISS

I. INTRODUCTION*

Under federal law as it existed prior to 1979, labor and management could negotiate benefits for pregnancy related disabilities ranging from full coverage to no coverage whatsoever. *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976).

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* Pursuant to Supreme Court Rule 28.1, the following is a listing of all parents, affiliates, and subsidiaries of the appellee airlines. Pan American World Airways, Inc.: Pan Am World Services, Inc. (subsidiaries); Braniff Airways, Inc.: Braniff International Corp. (parent), Braniff Airways De Mexico, S.A., Braniff Airways, S.A. (Uruguay), Radio Aeronautica Paraguaya, S.A., Servicios Aeroporturios Aerosan, S.A. (subsidiaries); Republic Airlines, Inc.: Republic Airlines West, Inc., Republic Energy, Inc. American Airlines, Inc.: Flagship International, Inc., AA Development Corp., AA Energy Corp., American Airlines De Mexico, S.A., AA Training Corp. (subsidiaries); United Air Lines, Inc.: Westin Hotel Co., GAB Business Services, Inc., Mauna Kea Properties, Inc. (affiliates).

The State of New York, by its Human Rights Law (HRL) and Disability Benefits Law (DBL), attempted substantially to restrict the options available. The question presented by this appeal is whether New York's efforts were subject to federal preemption. The question is insubstantial for at least two reasons:

i. the same basic issues were considered and resolved by this Court in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); and

ii. in terms of future conduct, the question is moot.

Consequently, the judgment should be affirmed, or the appeal dismissed, under Supreme Court Rules 16.1(c) and 16.1(d).

II. THE COURT OF APPEALS CORRECTLY HELD THAT ERISA PREEMPTS THE NEW YORK HRL.

Section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a), provides in pertinent part that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . not exempt under [ERISA § 4(b), 29 U.S.C. § 1003(b)]." Here, as in *Alessi*, the HRL "eliminates one method [of dealing with pregnancy disability — excluding coverage] — that [was] permitted by federal law." It thus relates to employee benefit plans and constitutes "an impermissible intrusion on the federal regulatory scheme." 451 U.S. at 524, 525 (footnote omitted).

New York does not appear seriously to contend otherwise. Rather, through a process of syllogistic reasoning, it proffers a "double savings clause argument": (i) ERISA does not "supersede" other federal laws, 29 U.S.C. § 1144(d); (ii) Title VII of the Civil Rights Act of 1964 "preserves" state laws, 42 U.S.C. § 2000e-7; (iii) ergo, ERISA does not "supersede" the New York HRL.

The first flaw in the deductive chain is that Title VII does *not* elevate the HRL to the status of a federal law which ERISA would not "supersede." A violation of the HRL does not give rise to a claim under Title VII; federal authorities do not enforce the HRL; an action premised on the HRL does not fall within the federal question jurisdiction of a United States district court.

Second, Title VII does not "preserve" the HRL from preemption by *other* federal laws with *different* purposes; only if it did could it be argued that ERISA "supersedes" Title VII. As was thus concluded by then-District Judge Newman in *Pervel Industries, Inc.* v. *Connecticut Commission on Human Rights*, 468 F.Supp. 490, 493 (D. Conn. 1978), *aff'd mem.*, 603 F.2d 214 (2d Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980):

> Section 514(d) of ERISA preserves federal law. [A state fair employment law] does not become a federal law simply because Title VII preserves its validity against a claim of preemption by Title VII.

Any other result would frustrate congressional intent to "preempt the field for Federal regulation, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." 120 *Cong. Rec.* 29,933 (1974). State fair employment laws variously outlaw discrimination based on sexual preference, marital status, medical condition, personal appearance, family responsibilities, political affiliation and source of income. *E.g.*, D.C. Code § 211(a)(1978); Minn. Stat. § 363.03 (1980); Cal. Gov't Code § 12,940(1980). If each is injected into ERISA through the back door of Title VII, federal uniformity will be sacrificed on the altar of state diversity.

The drafters of ERISA knew, of course, how to "preserve" those specific state laws which they did not intend to preempt. Section 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A), reads that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates

insurance, banking, or securities." Section 514(b)(4), 29 U.S.C. § 1144(b)(4), provides that ERISA "shall not apply to any generally applicable criminal law of a State." No section, however, "preserves" state fair employment laws. Nor does any section "preserve" state laws "preserved" by any other federal law, irrespective of its purpose.

Finally, even if the "double savings clause argument" somehow preserved the HRL from ERISA preemption, the argument still would not speak to the collective bargaining preemption. As this Court observed in *Alessi:*

> Where, as here, the [benefit] plans emerge from collective bargaining, the additional federal interest in precluding state interference with labor-management negotiations calls for pre-emption of state efforts to regulate [benefit plans]. . . . As a subject of collective bargaining, [benefit] terms themselves become expressions of federal law, requiring preemption of intrusive state law.

451 U.S. at 525-26 (citations and footnotes omitted).

The exclusion of pregnancy related disability from coverage can thus "be forbidden only by the terms of [negotiated benefit] plans themselves, or by . . . federal legislation." *Alessi*, 451 U.S. at 526 n.22. Title VII now provides, of course, that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for . . . receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . ." 42 U.S.C. § 2000e(k) (effective April 29, 1979). Prior to the federal enactment, however, it was not the province of state law to issue a like mandate.

III. THE COURT OF APPEALS CORRECTLY HELD THAT ERISA PREEMPTS THE NEW YORK DBL.

ERISA does not preempt state laws governing a benefit plan "maintained solely for the purpose of complying with applicable . . . disability insurance laws." 29 U.S.C. § 1003(b)(3).

The benefit plans maintained by the airlines have a multitude of purposes, only a limited number of which include compliance with state disability insurance laws. New York's contention that the DBL is nonetheless exempt from ERISA is astonishing. *Alessi* directly addressed the position which New York asserts and concluded that it "wreaks havoc on ERISA's plain language":

> The only relevant state laws, or portions thereof, that survive [ERISA's] preemption provision are those relating to plans that are themselves exempted from ERISA's scope. And the relevant exemption from ERISA's coverage — for plans maintained *solely* for compliance with state workers' compensation laws — has no bearing on the plans involved here, which more broadly serve employee needs as a result of collective bargaining.

451 U.S. at 523 n.20 (emphasis in the original). Since the airlines plans are "not maintained solely to comply with" the DBL, they cannot be regulated by the DBL. *Id.*

IV. NEW YORK'S APPEAL PRESENTS QUESTIONS OF HISTORICAL SIGNIFICANCE ONLY.

As noted above, federal law now requires coverage for pregnancy related disabilities. Any decision of this Court would relate, therefore, only to a brief period prior to 1979 when federal law was neutral on the subject. Given the demands on its resources, this Court must obviously concentrate on questions of prospective, rather than of historical, significance.

V. CONCLUSION

For the reasons stated above, the judgment should be affirmed or the appeal dismissed.

Respectfully submitted,

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Motion to Dismiss or Affirm

2

No. 81-1578

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In The

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OCTOBER TERM, 1981

WERNER H. KRAMARSKY, As Commissioner of the New York State Division of Human Rights,

Appellant,

against

BURROUGHS CORPORATION,

Appellee.

On Appeal From The United States Court Of Appeals For The Second Circuit

MOTION TO AFFIRM

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TABLE OF CONTENTS

	Page
Table of Authorities	*ii*
Preliminary Statement	1
Facts	1
ARGUMENT	
I. — This case presents no substantial question warranting plenary review	2
A. *The Court Below Properly Held That Because of Subsequent Doctrinal Developments It Was Not Bound By Summary Dispositions In This Court.*	2
B. *The Court Below Correctly Held That ERISA Preempts The New York Human Rights Law's Application To Employee Benefit Plans.*	6
II. — If this Court regards the question presented on appeal as substantial, it should only rule after full briefing and argument on the merits.	9
CONCLUSION	10
Statement Pursuant to Supreme Court Rule 28.1	11

TABLE OF AUTHORITIES

Cases: Page

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 101 S. Ct. 1895 (1981) 3, 4, 5, 7

Bucyrus-Erie Co. v. Dept. of Industry, Labor and Human Relations, 599 F.2d 205 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980) 3

Colorado Springs Amusements, Ltd. v. Rizzo, et al., 428 U.S. 913 (1976) 9

Doe v. Hodgson, 478 F.2d 537 (2d Cir.), *cert. denied*, 414 U.S. 1096 (1973), *application denied*, 500 F.2d 1206 (2d Cir. 1974) 3

Gast v. Oregon, 36 Ore. App. 441, 585 P.2d 12 (Ore. Ct. App. 1978) 5, 6

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 6

Hewlett-Packard Co. v. Barnes, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978) 7

Hicks v. Miranda, 422 U.S. 332 (1975) 3, 5

Lecates v. Justice of Peace Court No. 4, 637 F.2d 898 (3rd Cir. 1980) 6

Minnesota Mining & Mfg. Co. v. Minnesota, 444 U.S. 1041 (1980) 2, 3, 5, 6

Mountain States Tel. & Tel. Co. v. Commissioner, 445 U.S. 921 (1980) 2, 3, 5, 6

Pervel Industries, Inc. v. Connecticut Com. on Human Rights, 603 F.2d 214 (2d Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980) 3, 6, 7, 8

Port Authority Bondholders Protective Committee v. Port of New York Authority, 387 F.2d 259 (2d Cir. 1967) 5

Page

Statutes:

Federal:

Age Discrimination in Employment Act, 29 U.S.C. §§ 21 *et seq.* 8

Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* . . . . . *passim*

29 U.S.C. § 1003(b)(3) 4

29 U.S.C. § 1144(a) 3

29 U.S.C. § 1144(d) 7

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e17 7

42 U.S.C. § 2000e(k) 6

42 U.S.C. § 2000e-7 7

State:

N.Y. Executive Law, Art. 15 (McKinney 1972 & Supp. 1980-1981) (Human Rights Law) . . . . . *passim*

Miscellaneous:

House Conf. Rept. No. 93-1280, 93rd Cong., 2nd Sess. (1974) 8

H. Rep. No. 95-948, 95th Cong., 2nd Sess. (1978) 8

S. Rep. No. 95-331, 95th Cong., 1st Sess. (1977) 8

119 Cong. Rec. 3029-10 (1973) 8

120 Cong. Rec. 4726 (1974) 8

124 Cong. Rec. 4451 (1978) 8

In The

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against

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Appellee.

On Appeal From The United States Court Of Appeals For The Second Circuit

MOTION TO AFFIRM

PRELIMINARY STATEMENT

Appellee, Burroughs Corporation ("Burroughs"), moves this Court pursuant to Supreme Court Rule 16(1)(c) to affirm the judgment of the United States Second Circuit Court of Appeals below on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

FACTS

The facts are not in dispute and are as stated at pages 9-12 in the Jurisdictional Statement submitted by appellant herein and the other New York State appellants. *Burroughs* is one of three unconsolidated cases before this Court raising the same legal question. Unlike the fourteen airlines involved in *Kramarsky et*

al. v. Delta Air Lines, Inc. et al., ("Delta"), the only question pertaining to Burroughs which is before this Court is whether the Employee Retirement and Income Security Act of 1974 ("ERISA") preempts the New York Human Rights Law's ("HRL") regulation of employee benefit plans with respect to payment of pregnancy benefits during the years 1975-1979.[1] The Second Circuit below, properly we submit, held the HRL preempted in the opinions recorded on pages A1-A15 of the appellants' Appendix.[2]

ARGUMENT

POINT I

This case presents no substantial question warranting plenary review.

A. *The Court Below Properly Held That Because of Subsequent Doctrinal Developments It Was Not Bound By Summary Dispositions In This Court.*

In its original opinion, reported at 650 F.2d 1287, the Second Circuit held that it was bound by this Court's summary dismissals "for want of a substantial federal question," in *Minnesota Mining & Manufacturing Co. v. Minnesota*, 444 U.S. 1041 (1980), *dismissing appeal from* 289 N.W.2d 396 (Minn. 1979) ("Minnesota") and *Mountain States Tel. & Tel. Co. v. Commissioner*, 445 U.S. 921 (1980), *dismissing appeal from* 608 P.2d 1047 (Mont. 1979) ("Mountain States"). These

---

[1]Unlike *Delta*, *Burroughs* presents no question regarding preemption of the New York Disability Benefits Law, nor is there any question of preemption because of federal labor policy.

[2]The Second Circuit treated *Delta* as the lead case on this issue and adopted its reasoning in separate memorandum opinions in *Burroughs* and in *Metropolitan Life Insurance Company v. Kramarsky et al.* (A13-16). All references in this motion will be to the Second Circuit's discussion in *Delta*, as reported in the appellants' Appendix to Jurisdictional Statement.

decisions, the Second Circuit held, had the legal *effect* of summarily overruling, *sub silentio* and without full briefing or oral argument, the Second Circuit's own decision in *Pervel Industries, Inc. v. Connecticut Com. on Human Rights,* 603 F.2d 214 (2d Cir. 1979), *affirming* 468 F. Supp. 490 (D. C. Conn. 1978), *cert. denied,* 444 U.S. 1031 (1980) ("Pervel"), despite the fact that this Court had denied certiorari in *Pervel* only 1 week before the summary dismissal in *Minnesota.* 650 F.2d at 1295-96.[3] Although it found this sequence of events "rather mystifying," 650 F.2d at 1296, the Second Circuit held itself bound by the *Minnesota* and *Mountain States* summary dismissals and thus foreclosed from considering the ERISA preemption issue presented by Burroughs "until such time as the Court informs us that we are not." *Hicks v. Miranda,* 422 U.S. 332, 345 (1975) (quoting *Doe v. Hodgson,* 478 F.2d 537, 539 (2d Cir.), *cert. denied,* 414 U.S. 1096 (1973), *application denied,* 500 F.2d 1206 (2d Cir. 1974)).

Only a few months after the summary dismissals in *Minnesota* and *Mountain States,* and only a week after the Second Circuit's initial decision, this Court decided *Alessi v. Raybestos-Manhattan Inc.,* 451 U.S. 504, 101 S.Ct. 1895 (1981) ("Alessi"). In issue in *Alessi,* as in the present case, was the reach of ERISA Section 514(a) (29 U.S.C. § 1144(a)), which establishes the broad preemptive reach of ERISA, with exceptions not applicable here:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any

[3] *Pervel* held that a Connecticut anti-discrimination statute regulating payment of pregnancy benefits in ERISA-covered plans was preempted by ERISA. On the same date that it denied certiorari in *Pervel,* the Court also denied certiorari in *Bucyrus-Erie Co. v. Department of Industry, Labor & Human Relations,* 599 F.2d 205 (7th Cir. 1979), *cert. denied,* 444 U.S. 1031 (1980), where the Seventh Circuit reached the opposite conclusion on the ERISA preemption issue.

> employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Alessi specifically concerned an attack on ERISA-covered employee benefit plan provisions which provided for "integration" or set-off of workers compensation payments to reduce pension benefits for retirees. *See* 451 U.S. at 509. The retiree plaintiffs argued that set-off was unlawful under the provisions of a New Jersey law which expressly prohibited the practice. *See* 451 U.S. at 521-22. Holding that Section 514(a) preempted the New Jersey law despite the fact that the law only regulated the employee benefit plan indirectly, this Court made the following statement about the expansive reach of ERISA preemption:

> Whatever the purpose or purposes of the New Jersey statute, we conclude that it "relate[s] to pension plans" governed by ERISA because it eliminates one method for calculating pension benefits — integration — that is permitted by federal law. . . .
>
> It is of no moment that New Jersey intrudes indirectly, through a workers' compensation law rather than directly, through a statute called "pension regulation." ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern. For the purposes of the pre-emption provision, ERISA defines the term State to include: "a State, or any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate, *directly or indirectly*, the terms and conditions of employee benefit plans covered by this title." 29 U.S.C. § 1144(c)(2) (emphasis added). ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the pre-emption provision.

451 U.S. at 524-25 (emphasis in original).

Immediately after the *Alessi* decision, Burroughs and the other appellees petitioned the Second Circuit for rehearing,

contending that *Alessi* was a substantial doctrinal development which indicated that the Supreme Court did not consider the lower courts bound by the summary dismissals in *Minnesota* and *Mountain States*.

Relying on the language quoted above, the Second Circuit on rehearing held that *Alessi* constituted a doctrinal development vitiating any precedential effect of the summary dismissals in *Minnesota* and *Mountain States*. (A5); *See Hicks v. Miranda, supra,* at 344-45 (quoting *Port Authority Bondholders Protective Committee v. Port of New York Authority*, 387 F.2d 259, 263 n.3 (2d Cir. 1967)). Summarizing its analysis, the Second Circuit declared, "Had the principles stated in *Alessi* been applied to the *Minnesota* statute, the statute could not have been upheld." (A9).

That conclusion is indisputably correct, both in terms of the Second Circuit's reading of the *Hicks v. Miranda* doctrinal development rule and of its reading of *Alessi's* effect, as *Alessi's* broad reading of Section 514(a) is simply incompatible with the conclusion that lower court consideration of similar issues was foreclosed by the prior summary dismissals.

Not only was *Alessi* the *first* plenary Supreme Court consideration of ERISA Section 514(a), *Alessi* also gave clear indication that the issue in *Minnesota* and *Mountain States* remained open. In nullifying the New Jersey statute, the *Alessi* Court did not purport to establish the outer bounds of ERISA's preemptive language and in footnote 21, 451 U.S. at 525, noted that other courts had reached varying conclusions in other contexts. As an example, this Court cited *Gast v. Oregon*, 36 Ore. App. 441, 585 P.2d 12 (Ore. Ct. Appl. 1978). *Gast* had held that ERISA did not preempt an Oregon Civil Rights Act provision requiring private employee benefit plans to provide pregnancy benefits, the same issue raised in *Minnesota, Mountain States* and the present cases. This Court stated with regard to this case and others cited in the footnote: "We express no views on the merits of any of those decisions." 451

U.S. at 525, n.21. Because *Gast* was decided prior to the dismissals in *Minnesota* and *Mountain States* and was not appealed to the Supreme Court, it is submitted that no other conclusion can be drawn except that this Court expressed in *Alessi* that it did not consider the issue presented by those three cases — and the present one — to be foreclosed by the summary dismissals. As the Second Circuit correctly concluded below, there can be no other explanation for the inclusion of *Gast* in the footnote and for the Court's failure to mention either *Minnesota* or *Mountain States*. There can be little doubt, therefore, that the court below properly concluded that it was not foreclosed from considering itself the merits of Burroughs' claim.[4]

B. *The Court Below Correctly Held That ERISA Preempts The New York Human Rights Law's Application To Employee Benefit Plans.*

Once having determined that it could consider the issue on the merits, the Second Circuit correctly applied the reasoning of *Alessi* and its own prior decision in *Pervel* to hold the HRL pre-empted. Contrary to the contentions of the appellants, that decision is fully supported by ERISA's language and intent.

As the Second Circuit noted, prior to 1979 federal law permitted employers freedom to include or exclude pregnancy benefits from their employee benefit plans. (A10). *See General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)[5]. The HRL's

[4]The fact that the Second Circuit found a doctrinal development in a full opinion of the Court lends great weight to its analysis. Other circuits have used far less developed pronouncements of this Court in applying the *Hicks* rule. *See, e.g., Lecates v. Justice of Peace Court No. 4*, 637 F.2d 898, 907 (3rd Cir. 1980) (doctrinal development found in notation of probable jurisdiction which was later withdrawn).

[5]That freedom was of course ended by the amendment of Title VII in 1978. *See* Publ. L. No. 95-555, § 1, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)).

restriction of the pre-1979 freedom, as did the New Jersey statute in *Alessi,* eliminated a system of providing employee benefits which was permitted by federal law. *See* 451 U.S. at 524; (A11). Under the broad preemption language of Section 514(a), therefore, the federal interest in uniformity requires supersedure of the inconsistent state regulation.

While appellants do not seriously contest this application of Section 514(a), they argue that the HRL is saved from preemption by ERISA Section 514(d), 29 U.S.C. § 1144(d). That section exempts other federal laws, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17 ("Title VII"), from supersedure by ERISA. According to appellants, since Title VII itself exempts state anti-discrimination laws from supersedure by Title VII (See 42 U.S.C. § 2000e-7), that savings provision is engrafted into ERISA Section 514(d) and thus saves inconsistent state anti-discrimination laws from preemption by ERISA. (Jurisdictional Statement at 13-16).

The Second Circuit rejected this "double savings clause" argument in *Pervel, supra,* and repeated that rejection below. (A10-12). Sound reasoning supports affirmance of the Second Circuit's conclusion. *Cf. Hewlett-Packard Co. v. Barnes,* 571 F.2d 502 (9th Cir.), *cert. denied,* 439 U.S. 831 (1978) (Double savings clause argument rejected in context of HMO Act, 42 U.S.C. § 300(e) et seq.)

Initially, ERISA's structure and language do not support appellants' argument. Congress knew how to preserve specific state laws which ERISA was not intended to preempt. *See* Section 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A), which preserves state laws regulating insurance, banking, or securities, and Section 514(b)(4), 29 U.S.C., § 1144(b)(4), which saves state criminal laws. Nothing in ERISA specifically preserves state employment practice laws and it would be poor logic and bad statutory construction to find an implied preservation in the face of Congress's failure to enact a similar express preservation.

Appellants' claimed legislative history is not to the contrary.[6] The notion that state anti-discrimination laws were entitled to some special implied exception to ERISA preemption was specifically discussed and rejected by two of the principal figures involved in the passage of ERISA during debates on the 1978 amendments to the Age Discrimination in Employment Act:

> Mr. Javits. Finally, Mr. President, it is understood that just as these age discrimination amendments do not interfere with ERISA, State age discrimination in employment laws also are not to interfere with ERISA. The ADEA itself, as pointed out in the Senate report, does not preempt such State age discrimination laws. However, there should be no question that the preemption rules of Section 514(a) of ERISA shall be determinative regarding the preemption of state laws which directly or indirectly establish requirements relating to employee benefits plans. ERISA preemption of State age discrimination laws shall be determined without regard to Section 514(d) of ERISA or the fact that the ADEA does not itself preempt State law.
>
> Mr. Williams. I concur in my friend's observations as they accurately state the controlling principles of law in this regard. Federal law will preempt State age discrimination statutes only to the extent that those laws relate to an employee benefit plan described in Section 4(a) of ERISA and are not exempt under Section 4(b) of ERISA.

124 Cong. Rec. § 4451 (daily ed. March 23, 1978), as corrected, 124 Cong. Rec. § 4767 (daily ed. April 4, 1978). *See also Pervel, supra,* 468 F.Supp. at 493.

Finally, as recognized by the court below, "although Title VII saves state discrimination laws from preemption, it does

[6]The first legislative history cited by Appellants recognizes no more than that Title VII is not preempted by ERISA. The remaining legislative history, concerning the amendment of Title VII in 1978, likewise casts no light on the scope of ERISA preemption.

not transform those laws into federal laws, and only federal laws are protected from preemption by ERISA." (A12). Title VII simply cannot be read to "preserve" the HRL from preemption by a separate federal law with a different purpose; it only "preserves" it from the preemptive reach of Title VII itself. To argue otherwise would require a form of bootstrap logic which is contrary to ERISA's language, structure, and intent to foster uniform national regulation of employee benefit plans.

POINT II

If this Court regards the question presented on appeal as substantial, it should only rule after full briefing and argument on the merits.

Burroughs submits that the well-reasoned opinion below correctly states the applicable principles of law and, under this Court's discretionary mode of review, renders the question "unsubstantial" and not deserving of plenary review. Should this Court believe otherwise, however, Burroughs requests that the Court grant full review and clarify the apparent inconsistencies in its treatment of the ERISA preemption issue.

Granting of appellants' alternative request for a summary reversal of the decision below, in light of *Alessi,* could only create more confusion in this area and, moreover, would cut against the interest of reasoned administration of justice. Principled decision-making, we respectfully submit, mandates this Court either affirm the decision below, which is consistent with *Alessi,* or note probable jurisdiction and grant plenary review. Any other course, in light of the past treatment of this issue, would be "both an unwise and unseemly administration of justice." *Colorado Springs Amusements, Ltd. v. Rizzo, et al.*, 428 U.S. 913 (1976) (Brennan, J., dissenting from denial of certiorari).

CONCLUSION

For the foregoing reasons, we respectfully submit that the questions presented by appellants are clearly unsubstantial and that the judgment of the Court below should be affirmed.[7]

Dated: March 26, 1982

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[7]As a further reason for affirmance, Burroughs submits that because of the Amendment of Title VII in 1978, which effectively moots the within issue from 1979 onwards, the present case is of only limited significance.

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

Appellee, Burroughs Corporation, is a parent corporation for the following non-wholly owned subsidiaries:

Tata-Burroughs Ltd.

Memorex-Japan Ltd.

Memorex S.A.

Teijin-Memorex Co. Ltd.

Motion to Dismiss or Affirm

3

Supreme Court, U.S.
FILED
MAR 29 1982
ALEXANDER L. STEVAS
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No. 81-1578

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WERNER H. KRAMARSKY, As Commissioner of the New York State Division of Human Rights, the NEW YORK STATE DIVISION OF HUMAN RIGHTS, and the NEW YORK STATE HUMAN RIGHTS APPEAL BOARD,

Appellants,

—against—

METROPOLITAN LIFE INSURANCE COMPANY,

Appellee.

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Preliminary Statement

Appellee, Metropolitan Life Insurance Company ("Metropolitan"), moves, pursuant to Supreme Court Rule 16, to dismiss the appeal or to affirm the judgment of the United States Court of Appeals for the Second Circuit entered below.

Facts

The facts are as stated at pages 9-12 of the jurisdictional statement.

Argument

Appellants have filed a single jurisdictional statement embracing this and two related appeals, *Kramarsky, et al.* v. *Delta Air Lines, Inc., et al.* ("*Delta*"), Docket No. 81-1578, and *Kramarsky, et al.* v. *Burroughs Corporation* ("*Burroughs*"), Docket No. 81-1578. Appellees in *Delta* and *Burroughs* have each filed motions to dismiss or affirm.

Metropolitan sees no useful purpose in burdening the Court with a repetition of those motions. Instead, relying on the arguments made by Delta and Burroughs, Metropolitan simply adds its request that the appeals in all three matters be dismissed or that the judgments below be affirmed.

We do wish to emphasize, however, that the issue tendered by appellants—whether the Employee Retirement Income Security Act of 1974 ("ERISA") preempts the New York State Human Rights Law insofar as it requires employee benefit plans covered by ERISA to provide pregnancy disability and medical expense benefits—has ceased to have any prospective importance by virtue of the April 29, 1979 Amendment to Title VII of the Civil Rights Act of 1964, which extended coverage to pregnant employees as a matter of federal law. The question raised in these appeals has thus become academic and insubstantial.

CONCLUSION

The appeal should be dismissed or the judgment below affirmed.

Respectfully submitted,

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Statement Pursuant to Supreme Court Rule 28

Metropolitan has an interest in the following entities:

1. Transatlantic Reinsurance Company, a New York corporation, with offices at 70 Pine Street, New York, New York, which represents a joint venture of Metropolitan and other companies;

2. National Electronic Information Corporation, a Delaware corporation, with offices at 675 Third Avenue, New York, New York, which represents a joint venture of Metropolitan and other companies;

3. E. T. Barwick Industries, Inc., a Georgia corporation, with offices at 5775-C Peachtree-Dunwoody Road N.E., Atlanta, Georgia, an affiliate and/or a subsidiary of Metropolitan; and

4. Dawn Water Company, a California non-profit mutual water company, with offices at 10960 Wilshire Boulevard, Los Angeles, California, in which Metropolitan is the majority shareholder.

Appellant's Brief

FILED
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ALEXANDER L. STEVAS,
CLERK

No. 81-1578

IN THE

Supreme Court of the United States

October Term, 1981

WERNER H. KRAMARSKY, Individually and in his capacity as Commissioner of the New York State Division of Human Rights; ANN THACHER ANDERSON, Individually and in her capacity as General Counsel of the New York State Division of Human Rights; the NEW YORK STATE DIVISION OF HUMAN RIGHTS, an agency of the Executive Department of the State of New York; WILLIAM B. KROEGER, Individually and in his capacity as Chairman of the New York State Workers' Compensation Board; and the NEW YORK STATE WORKERS' COMPENSATION BOARD,

Appellants,

against

DELTA AIR LINES, INC., ALLEGHENY AIRLINES, INC., NATIONAL AIRLINES, INC., PIEDMONT AVIATION, INC., BRANIFF AIRWAYS, INC., NORTH CENTRAL AIRLINES, INC., SOUTHERN AIRWAYS, INC., EASTERN AIR LINES, INC., NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., OZARK AIR LINES, INC., AMERICAN AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., and UNITED AIR LINES, INC.,

Appellees.

WERNER H. KRAMARSKY, As Commissioner of the New York State Division of Human Rights,

Appellant,

against

BURROUGHS CORPORATION,

Appellee.

WERNER H. KRAMARSKY, As Commissioner of the New York State Division of Human Rights, the NEW YORK STATE DIVISION OF HUMAN RIGHTS, and the NEW YORK STATE HUMAN RIGHTS APPEAL BOARD,

Appellants,

against

METROPOLITAN LIFE INSURANCE COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Second Circuit

BRIEF FOR APPELLANTS

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Questions Presented

As to All Three Appeals:

1. Does the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 ("ERISA") preempt the New York Human Rights Law's requirement that employers provide disability benefits on a non-discriminatory basis?

2. Did Congress intend that ERISA supersede state fair employment laws that are an integral part of the federal fair employment scheme?

3. Does this Court's decision in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), compel the holding that ERISA preempts the Human Rights Law?

As to the Delta Air Lines Appeal Only:

4. Does ERISA preempt the New York Disability Benefits Law's requirements for all employers, except those who administer disability benefits in a unit separate from all other employee benefits?

Parties

The parties to the proceedings below are listed in the caption, except that appellant William B. Kroeger, the current Chairman of the New York Workers' Compensation Board, was substituted as successor in office to original defendant Arthur Cooperman, pursuant to Fed. R. App. P. 43(c) and Rule 40.3 of the Rules of this Court.

TABLE OF CONTENTS

	PAGE
Questions Presented	1
Parties	1
Table of Authorities	v
Opinions Below	2
Jurisdiction	2
Statutory Provisions	3
Statement of the Case	10
Statutory Background	10
The Complaints	13
The District Court Decisions	14
The Court of Appeals Decisions	16
Summary of Argument	18
Argument	
I. ERISA Does Not Preempt the HRL	19
A. ERISA's language allows the HRL to be applied to appellees' benefit plans	20
1. State fair employment laws are essential to Title VII's enforcement scheme	21

PAGE

2. Preemption of the HRL would alter, modify, invalidate and impair a federal statute 25

B. Legislative history of ERISA and Title VII demonstrates Congress' desire to preserve state fair employment laws 30

C. This Court's decision in *Alessi* does not affect this case 34

II. ERISA Does Not Preempt the DBL 37

Conclusion 49

TABLE OF AUTHORITIES

PAGE

Cases:

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) 12, 17, 19, 28, 34–36
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 25, 26

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) 35
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Bucyrus-Erie Co. v. Department of Industry, Labor and Human Relations, 599 F.2d 205 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980) 12, 19, 35

Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) 28, 41

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Love v. Pullman Co., 404 U.S. 522 (1972) 22, 24
Lukus v. Westinghouse Electric Corp., 276 Pa. Super. 232, 419 A.2d 431 (Pa. Super. Ct. 1980) 20

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Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973) 48
Minnesota Mining & Manufacturing Co. v. Minnesota, 289 N.W.2d 396 (Minn. 1979), *appeal dismissed*, 444 U.S. 1041 (1980) 16, 17, 20, 36
Mohasco Corp. v. Silver, 447 U.S. 807 (1980) 24
Mountain States Tel. & Tel. Co. v. Commissioner of Labor and Industry, 608 P.2d 1047 (Mont. 1979), *appeal dismissed*, 445 U.S. 921 (1980) 16, 17, 20, 36

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980) 21, 22, 24–26, 28, 29
New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519 (1979) 44
North Haven Board of Education v. Bell, 50 U.S.L.W. 4501 (May 17, 1982) 26, 32, 35, 44, 47

Pervel Industries, Inc. v. Connecticut Commission on Human Rights, 468 F. Supp. 490 (D. Conn. 1978), *aff'd*, 603 F.2d 214 (2d Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980) 14, 20, 21

PAGE

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Statutes:

Federal:

28 U.S.C. § 1254(2) 2
Equal Pay Act, 29 U.S.C. § 206(d) (1978) 13
Welfare and Pension Plans Disclosure Act of 1958 ("WPPDA"), 29 U.S.C. §§ 301-309 (1975 Ed.) ..... *passim*
29 U.S.C. § 303(b)(2) 42, 44

PAGE

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461 (1975) *passim*
ERISA, 29 U.S.C. § 1001 41
ERISA, § 4(b), 29 U.S.C. § 1003(b) 37
ERISA, § 4(b)(3), 29 U.S.C. § 1003(b)(3) 12, 15, 16, 37–42, 44, 45, 47, 48
ERISA, § 111(a)(1), 29 U.S.C. § 1031(a)(1) 42
ERISA, § 514(a), 29 U.S.C. § 1144(a) 12, 17, 20, 21, 26, 30, 34, 36, 39
ERISA, § 514(d), 29 U.S.C. § 1144(d) 12, 20, 21, 25–27, 36
Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 932 (1978) 48
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(k) (1981) 15
42 U.S.C. § 2000e-2 11
42 U.S.C. § 2000e-2(a) 30
42 U.S.C. § 2000e-5 29, 32
42 U.S.C. § 2000e-5(b) 22
42 U.S.C. § 2000e-5(c) 22, 24
42 U.S.C. § 2000e-5(d) 22
42 U.S.C. § 2000e-5(k) 24
42 U.S.C. § 2000e-7 21, 27, 28
42 U.S.C. § 2000e-8(b) 22
42 U.S.C. § 2000e-8(d) 22
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State:

Haw. Rev. Stat. §§ 393-1–393-51 45
N.J. Stat. Ann. § 34:15-29 (West 1959 & Supp. 1981-1982) 34
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HRL § 296.1(a) 10, 11, 19
HRL § 296.2 10

PAGE

HRL § 296.4 10
HRL § 296.5 10
HRL § 296-a 10
HRL § 297.1 29
N.Y. Workers' Compensation Law, Art. 9 (McKinney 1965 & Supp. 1981-1982) (Disability Benefits Law) ("DBL") ..... *passim*
DBL § 202 37
DBL § 203 37
DBL § 204.1 37
DBL § 204.2 11
DBL § 205 37
DBL § 205.1 11
DBL § 205.3 ..... 11–13, 15, 16
DBL § 206.1(a) 37
DBL § 208 40
DBL § 209.3 37
DBL § 210 37
DBL § 211 40
DBL § 211.1 38
DBL § 211.2 38
DBL § 211.3 38
DBL § 211.5 38
DBL § 220 40
DBL § 221 40
DBL § 226 40
DBL § 234 40

Regulations:

Executive Order No. 11246, 3 C.F.R. 339 (1964-1965 Comp.) *reprinted in* 42 U.S.C. § 2000e app. at 19-24 (1981) 13
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PAGE

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110 Cong. Rec. 1635-1636 (1964) 23
110 Cong. Rec. 1643 (1964) 27
110 Cong. Rec. 7205 (1964) 23, 25, 29
110 Cong. Rec. 7207 (1964) 23
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110 Cong. Rec. 12,819 (1964) 23
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119 Cong. Rec. 30,409-30,410 (1973) 31
120 Cong. Rec. 4726 (1974) 32
S. 4, 93rd Cong., 2d Sess., 119 Cong. Rec. 29,890 (1973) 30, 41
Amendment No. 496, 119 Cong. Rec. 30,011 (1973) 30

PAGE

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Pub. L. No. 92-261, 1972 U.S. Code Cong. & Ad. News (86 Stat.) 103 (Equal Employment Opportunity Act of 1972) 31
1965 N.Y. Laws, ch. 516, § 1 19
1977 N.Y. Laws, ch. 675, § 29 12
1981 N.Y. Laws, ch. 352, § 2 12

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IN THE

Supreme Court of the United States

October Term, 1981

No. 81-1578

WERNER H. KRAMARSKY, *etc., et al.*,
Appellants,

against

DELTA AIR LINES, INC., *et al.*,
Appellees.

WERNER H. KRAMARSKY, *etc.*,
Appellant,

against

BURROUGHS CORPORATION,
Appellee.

WERNER H. KRAMARSKY, *etc., et al.*,
Appellants,

against

METROPOLITAN LIFE INSURANCE COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Second Circuit

BRIEF FOR APPELLANTS

Opinions Below

The decisions of the Court of Appeals on rehearing are reported at 666 F.2d 21 (2d Cir. 1981) (*Delta Air Lines, Inc.* v. *Kramarsky* ["*Delta*"]); 666 F.2d 26 (*Burroughs Corp.* v. *Kramarsky* ["*Burroughs*"]); 666 F.2d 27 (*Metropolitan Life Insurance Co.* v. *Kramarsky* ["*Metropolitan*"]) and are reproduced at A1-A12, A13-A14, and A15-16 of the Appendix to the Jurisdictional Statement respectively.* The orders of the Court of Appeals staying these decisions pending review by this Court are reproduced at A130-A137. The decisions of the Court of Appeals dated May 11, 1981 are reported at 650 F.2d 1287 (*Delta*), 650 F.2d 1308 (*Burroughs*) and 650 F.2d 1309 (*Metropolitan*), and are reproduced at A23-A66, A67-A69 and A70-A72, respectively. The opinion of the United States District Court for the Southern District of New York (*Delta*) is reported at 485 F. Supp. 300 and reproduced at A77-A102. The opinion of the United States District Court for the Western District of New York (*Burroughs*) is reproduced at A107-A117.

Jurisdiction

The Court of Appeals' initial judgments were entered on May 11, 1981. Rehearing was granted on October 8, 1981, and judgments after rehearing were entered on November 24, 1981. The jurisdictional statement was filed on February 22, 1982, and probable jurisdiction noted on April 19, 1982 (50 U.S.L.W. 3838).** This Court has jurisdiction pursuant to 28 U.S.C. § 1254(2).

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* Citations in the form "A——" are to the Appendix to the Jurisdictional Statement and in the form "JA ——" to the Joint Appendix.

** Pursuant to Rule 10.6 of the Rules of this Court, because all three decisions of the Second Circuit Court of Appeals involve closely related issues, appellants filed a single jurisdictional statement covering all issues on appeal.

Statutory Provisions

ERISA § 3, 29 U.S.C. § 1002, provides in pertinent part:

Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2) The terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(A) provides retirement income to employees, or

(B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the

benefits under the plan or the method of distributing benefits from the plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

ERISA § 4, 29 U.S.C. § 1003, provides in pertinent part:

Coverage

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

(b) The provisions of this subchapter shall not apply to any employee benefit plan if—

* * * *

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws.

ERISA § 514, 29 U.S.C. § 1144, provides in pertinent part:

Other laws

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all

State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

* * * *

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5, provides in pertinent part:

Enforcement Provisions

* * * *

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-managment committee controlling apprenticeship or other training or retraining, including on-the-job train-

ing programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. . . .

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year

after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-7, provides:

Effect on State laws

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a

State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

Title XI of the 1964 Civil Rights Act, 42 U.S.C. § 2000h-4, provides:

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

Human Rights Law, N.Y. Executive Law (McKinney 1972 and Supp. 1980-1981), provides in pertinent part:

§ 296. Unlawful discriminatory practices.

1. It shall be an unlawful discriminatory practice:

(a) For an employer . . . because of the age, race, creed, color, national origin, sex or disability, or marital status of any individual . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

Disability Benefits Law, N.Y. Workers' Compensation Law (McKinney 1965 & Supp. 1981-1982), provides in pertinent part:

§ 204. Disability During Employment

1. Disability benefits shall be payable to an eligible employee for disabilities . . . beginning with the eighth

consecutive day of disability and thereafter during the continuance of disability, subject to the limitations as to maximum and minimum amounts and duration and other conditions and limitations in this section and in sections two hundred five and two hundred six. . . .

2. The weekly benefit which the disabled employee is entitled to receive for disability commencing on or after July first, nineteen hundred seventy-four shall be one-half of the employee's average weekly wage but in no case shall such benefit exceed ninety-five dollars nor be less than twenty dollars; except that if the employee's average weekly wage is less than twenty dollars, his benefit shall be such average weekly wage. . . .

§ 205. No employee shall be entitled to benefits under this article:

1. for more than twenty-six weeks during a period of fifty-two consecutive calendar weeks or during any one period of disability;

* * * *

3. notwithstanding any other provision of law, for a period of disability in excess of eight weeks caused by or arising in connection with a pregnancy except for a period of disability occurring as a result of a complication of such pregnancy, and the liability of the employer or the chairman as provided in this article shall be the exclusive statutory remedy of an employee for disability caused by or arising in connection with a pregnancy.*

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* DBL § 205.3 was repealed, effective June 29, 1981. 1981 N.Y. Laws, ch. 352, § 2.

Statement of the Case

The facts in these cases are not in dispute. Fourteen major airlines ("the airlines"), Burroughs Corporation ("Burroughs") and Metropolitan Life Insurance Company ("Metropolitan") have refused to fulfill their obligations under New York law to provide disability benefits to thousands of female workers disabled because of pregnancy.

The companies base their refusal to comply with New York's laws on alleged preemption by federal law, and the Court of Appeals agreed, holding that the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1975 & Supp. 1976-1981) ("ERISA") does preempt the New York laws at issue.

The legal issues before this Court are thus straightforward: May New York prohibit discrimination in terms, conditions and privileges of employee benefit plans by employers subject to ERISA?; and may New York require employers subject to ERISA to provide workers with disability benefits for non-job-related illnesses and injuries?

Statutory Background

New York's Human Rights Law (Executive Law, Article 15) ("HRL") is a comprehensive anti-discrimination statute that prohibits, *inter alia,* employment discrimination based on sex.[1] HRL § 296.1(a). On December 20, 1976, the

1. The HRL also prohibits employment discrimination based on age, race, creed, color, national origin, disability and marital status. HRL § 296.1(a). In addition, the statute forbids discrimination in housing (§ 296.5), places of public accommodation (§ 296.2), nonsectarian educational institutions (§ 296.4), and credit (§ 296-a).

New York Court of Appeals held that this prohibition includes discrimination by private employers in the provision of disability benefits related to pregnancy. *Brooklyn Union Gas Co.* v. *New York State Human Rights Appeal Board*, 41 N.Y.2d 84 (1976).[2] Thus, New York employers who pay benefits for non-job-related disabilities may not refuse to pay such benefits to women disabled on account of pregnancy. After the *Brooklyn Union Gas Co.* decision, the New York State Division of Human Rights, the administrative agency responsible for investigating and adjudicating discrimination complaints, entered orders finding that numerous employers, including Metropolitan, Burroughs, and several airlines were unlawfully discriminating against female employees in violation of HRL § 296.1(a) by failing to provide them with benefits equal to those provided male employees for non-job-related disabilities. (*See* JA 5, ¶¶ 12, 13; JA 75-JA 77, ¶¶ 5-9; JA 90-JA 94, ¶¶ 9-17.)

Since 1949, New York's Disability Benefits Law (Workers' Compensation Law, Article 9) ("DBL") has required employers to provide benefits to workers disabled due to non-occupational causes.[3] Until August 3, 1977, DBL § 205.3 (McKinney 1965) provided that no employee was entitled to benefits for disabilities "caused by or arising in connection with a pregnancy." Effective that date, the DBL was

2. By contrast, this Court had previously concluded that the prohibition against sex discrimination in Title VII of the 1964 Civil Rights Act ("Title VII"), 42 U.S.C. § 2000e-2 (1981), did not forbid exclusion of disabilities related to pregnancy from an employee disability benefits plan. General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

3. Currently, employees are entitled to receive the lesser of $95 per week or one-half their average weekly wage, for a maximum of 26 weeks of disability in any one-year period. DBL §§ 204.2, 205.1 (McKinney 1965 & Supp. 1981-1982).

amended to require employers to provide a maximum of eight weeks of benefits for disabilities caused by or arising from pregnancy.[4]

Enacted in 1974, ERISA was designed to protect employees' expectations as participants in pension and welfare benefit plans and particularly to prevent abuses encountered in the administration of pension plans. Primarily, ERISA regulates participation, vesting, and funding of *pension* plans. ERISA, Subch. I, Subtitle B, Pts. 2, 3; *see* Subchs. II & III. The statute also contains general requirements concerning reporting and disclosure, and fiduciary responsibility applicable to both pension and welfare benefit plans. ERISA, Subch. I, Subtitle B, Pts. 1, 4. ERISA does not mandate that any particular benefits be provided in a pension or welfare benefit plan,[5] and does not prohibit discrimination based on sex or any other grounds in the provision of pension or welfare benefits.[6] By its terms, ERISA (§ 514(a), 29 U.S.C. § 1144(a)) supersedes all state laws that "relate to" employee benefit plans covered by ERISA, but it does not "alter, amend, modify, invalidate, impair or supersede" any federal statutes. ERISA § 514(d), 29 U.S.C. § 1144(d). Moreover, by its terms, ERISA (§ 4(b)(3), 29 U.S.C. § 1003(b)(3)) does not

4. 1977 N.Y. Laws, ch. 675, § 29, codified at DBL § 205.3 (McKinney Supp. 1980-1981). Effective June 29, 1981, subdivision 3 was repealed. 1981 N.Y. Laws, ch. 352, § 2. Thus, the DBL now does not contain any limitation on or distinction concerning pregnancy disability benefits.

5. *See* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 511-512 (1981).

6. *See* Bucyrus-Erie Co. v. Department of Industry, Labor & Human Relations, 599 F.2d 205, 207 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980).

apply to plans maintained solely to comply with workmen's compensation, unemployment compensation or disability insurance laws.

The Complaints

In July 1977, the airlines commenced the *Delta* action in the United States District Court for the Southern District of New York against the New York State Division of Human Rights, its Commissioner and General Counsel (referred to collectively as the "Division"). The airlines averred that they maintained employee benefit plans that provide benefits to employees who incur any non-job-related disability, except those connected with pregnancy (JA 4, ¶¶ 7-9; JA 31-JA 32, ¶¶ 9-11). Alleging that ERISA §514(a) preempts the HRL, they sought declaratory and injunctive relief to prevent the Division from enforcing the HRL insofar as that law prohibited the airlines from discriminating against workers disabled due to pregnancy (JA 5-JA 8; JA 34-JA 35; JA 46-JA 49). In December 1977, the airlines amended their complaint to add as defendants the New York Workers' Compensation Board and its Chairman (referred to collectively as the "Board"), and sought to enjoin enforcement of DBL § 205.3 on similar grounds.[7] (*See* JA 25-JA 27; JA 31; JA 50-JA 52; JA 60-JA 63.)

Burroughs was filed on October 5, 1979 in the United States District Court for the Western District of New York.

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7. The airlines also urged that both state statutes were preempted by the Railway Labor Act, 45 U.S.C. §§ 151-188 (1976), and conflicted with Title VII, the Equal Pay Act, 29 U.S.C. § 206(d) (1978) and Exec. Order No. 11246, 3 C.F.R. 339 (1964-1965 Comp.) *reprinted in* 42 U.S.C. § 2000e app. at 19-24 (1981) (JA 35-JA 45; JA 52-JA 60). These claims were resolved against the airlines (A12 n. 2; A39-A52) and are not before this Court.

As in *Delta*, Burroughs alleged it maintained a disability benefits plan providing benefits for all employees' non-job-related disabilities, with the exception of disabilities related to pregnancy (JA 74, ¶¶ 2-3; JA 83, ¶ 7). Burroughs sought to enjoin the Division from adjudicating complaints of and enforcing orders finding sex discrimination by Burroughs against its female employees who had been denied disability benefits for pregnancy-related disabilities (JA 72; JA 82-JA 83, ¶ 6). Burroughs argued that the HRL was preempted by ERISA (JA 78, ¶ 16; JA 85, ¶ 13).

Similarly, in *Metropolitan*, filed February 13, 1980 in the United States District Court for the Southern District of New York, plaintiff alleged that the HRL was preempted by ERISA (JA 94, ¶ 20). Metropolitan sought, in addition to declaratory relief, preliminary and permanent injunctions restraining the Division from proceeding on complaints filed by employees of Metropolitan who suffered pregnancy disability (JA 95).

The District Court Decisions

On January 28, 1980, the district court in *Delta* issued an opinion regarding all preemption issues. The court held that the HRL was preempted by ERISA, relying exclusively on the Second Circuit Court of Appeals' summary affirmance in *Pervel Industries, Inc.* v. *Connecticut Commission on Human Rights*, 603 F.2d 214 (2d Cir. 1979), *affirming* 468 F. Supp. 490 (D. Conn. 1978), *cert. denied*, 444 U.S. 1031 (1980) (*"Pervel"*). The court declared the HRL preempted insofar as it required alteration of the airlines' employee benefit plans, and it enjoined the Divi-

sion from enforcing the HRL with respect to the airlines' plans for the relevant time period (A73-A76).[8]

The court also granted the Board's motion to dismiss the complaint, rejecting the airlines' claim that ERISA preempts the DBL. Relying on the statutory language that excludes from ERISA's coverage those benefit plans "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws" (ERISA § 4(b)(3), 29 U.S.C. § 1003(b)(3)), the court held that "ERISA and state workmen's compensation laws create independent and concurrent obligations . . ." (A90). Further, the court held that the airlines would be including pregnancy benefits in their disability plans solely to comply with DBL § 205.3, and thus the requirements of § 205.3 are permissible under ERISA (A88-A90).

The district courts in *Burroughs* and *Metropolitan* also found that ERISA preempts the HRL and enjoined the Division from "prosecuting and enforcing" complaints filed by female employees who alleged that denial of benefits for disability related to pregnancy constituted sex discrimination in the terms, conditions and privileges of employment (A103-A104, A116-A117, A118-A120).

8. The court also decided that the federal Pregnancy Discrimination Act of 1978, which amended Title VII to require employers to treat pregnancy disability the same as all other non-job-related disabilities, rendered the issue of whether ERISA preempted the HRL moot after the Pregnancy Act's effective date, April 29, 1979 (A80). Pub. L. No. 95-555, § 1, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e [k]). The airlines do not dispute this holding, conceding that as of April 29, 1979, Title VII has required them to provide pregnancy disability benefits on an equal basis with all other disability benefits. *See* Motion of Appellee Airlines to Affirm or Dismiss at 5; A32 n. 9.

The Court of Appeals Decisions

The Division appealed to the United States Court of Appeals for the Second Circuit from each of the three district court orders declaring the HRL preempted. The airlines cross-appealed from that portion of the *Delta* order upholding DBL § 205.3.

On May 11, 1981, the Second Circuit reversed the district court orders enjoining enforcement of the HRL (A34-A39, A69, A72). The Second Circuit ruled that it was bound by this Court's dismissals, for want of a substantial federal question, of appeals from decisions of two state courts holding that ERISA did not preempt fair employment legislation that prohibits employers from discriminating against pregnant employees. *Minnesota Mining & Manufacturing Co.* v. *Minnesota*, 444 U.S. 1041 (1980), dismissing appeal from 289 N.W.2d 396 (Minn. 1979) ("*Minnesota*"); *Mountain States Tel. & Tel. Co.* v. *Commissioner of Labor and Industry*, 445 U.S. 921 (1980), dismissing appeal from 608 P.2d 1047 (Mont. 1979) ("*Mountain States*").

The Court of Appeals also vacated the *Delta* district court's ruling that DBL § 205.3 was not preempted by ERISA. The court held that the airlines' pregnancy disability plans were not plans "maintained solely for the purpose of complying with" a state disability insurance law within the meaning of ERISA § 4(b)(3) unless they were maintained in an administrative unit separate from all other employee benefits (A63-A64). The court went on to find that DBL § 205.3 "relates to" employee benefit plans

within the meaning of ERISA § 514(a), and thus was preempted and could not be applied to appellees' benefit plans. In addition, the Court, addressing issues not raised on appeal, stated that unless employers provided benefits in a separate administrative unit, "[t]he DBL is preempted in its entirety . . . and is wholly unenforceable" (A66).[9]

The airlines, Burroughs, Metropolitan and the Board petitioned the Second Circuit for rehearing. The Court of Appeals granted rehearing on October 8, 1981 to determine whether its decisions regarding preemption of the HRL should be reversed in light of this Court's intervening decision in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) ("*Alessi*") (A17, A19, A21). On November 24, 1981, the court ruled that *Alessi* was a "doctrinal development" sufficient to deprive this Court's decisions in *Minnesota* and *Mountain States* of all precedential weight (A5). Thus, the Court of Appeals vacated its May 11, 1981 decisions sustaining the HRL, held HRL § 296 preempted by ERISA, and affirmed the injunctions granted by the district courts (A12, A14, A16). The Court of Appeals also reaffirmed, in all respects, its ruling regarding preemption of the DBL (A12). On January 22, 1982, the Court of Appeals granted appellants' requests for stays of its November 24, 1981 rehearing decisions, pending review by this Court (A130-A137).

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9. As the district court had not analyzed the precise details of the airlines' plans, the Court of Appeals remanded the case for the district court to determine whether the plans were separately maintained (A65-A66).

Summary of Argument

The Second Circuit Court of Appeals incorrectly held both that ERISA preempts the New York Human Rights Law and the Disability Benefits Law.

Congress did provide that ERISA supersedes state laws that relate to employee benefit plans, but it also declared that ERISA may not alter, modify, invalidate or impair other federal statutes. Because the Human Rights Law is an integral component of the federal fair employment scheme of Title VII of the 1964 Civil Rights Act, the Human Rights Law was not intended to be preempted in the circumstances of this case.

In addition, ERISA explicitly exempts from its coverage employee benefit plans that are maintained solely to comply with state disability insurance laws. The New York Disability Benefits Law is such a statute, and appellees' plans would provide disability benefits solely to meet its requirements. Therefore, New York may, consistent with ERISA, require employers to abide by the requirements of its Disability Benefits Law.

ARGUMENT

I. ERISA Does Not Preempt the HRL.

Since 1945, New York has prohibited employers from discriminating against employees in the terms, conditions or privileges of employment. HRL § 296.1(a). Beginning in 1965, employers were forbidden to discriminate on the basis of sex, including on the basis of pregnancy.[10] The Second Circuit Court of Appeals found this longstanding statutory commitment to equal employment opportunity for New York workers superseded by ERISA. It ruled that ERISA, in effect, sanctions employers' discriminatory treatment of pregnant workers.

The Court of Appeals reached this result without examining the language and legislative history of ERISA, because it believed that preemption was compelled by this Court's decision in *Alessi*. However, ERISA's terms and legislative history demonstrate Congress' intent that ERISA not preempt state fair employment laws such as the HRL. Furthermore, Title VII's language and legislative history, and this Court's decisions regarding the interrelation of Title VII and state fair employment laws, confirm that the HRL may be applied to appellees' benefit plans.[11] Finally, nothing in the *Alessi* decision is to the contrary.

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10. 1965 N.Y. Laws, ch. 516, § 1, effective September 1, 1965; Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board, 41 N.Y.2d 84, 86 (1976); Union Free School District No. 6 v. New York State Human Rights Appeal Board, 35 N.Y.2d 371, 375-376 (1974).

11. Numerous federal and state courts have agreed that ERISA does not preempt state fair employment statutes: Bucyrus-Erie Co.

(footnote continued on next page)

A. ERISA's language allows the HRL to be applied to appellees' benefit plans.

By its terms, ERISA supersedes all state laws "insofar as they may now or hereafter relate to" employee benefit plans covered by ERISA. § 514(a), 29 U.S.C. § 1144(a). However, ERISA's preemptive effect is explicitly limited by § 514(d), which provides that

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

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v. Dept. of Industry, Labor and Human Relations, 599 F.2d 205 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980); Thompson v. Board of Education of the Romeo Community Schools, 519 F. Supp. 1373, 1378-1379 (W.D.Mich. 1981); Westinghouse Electric Corp. v. Maryland Commission on Human Relations, 520 F. Supp. 539 (D. Md. 1981); Gast v. Oregon, 36 Or.App. 441, 585 P.2d 12 (Or. Ct. App. 1978); Illinois Bell Telephone Co. v. Fair Employment Practices Commission, 68 Ill.App.3d 829, 386 N.E.2d 599 (Ill. App. Ct. 1st Dist. 1979), *rev'd on other grounds*, 81 Ill. 2d 136, 407 N.E.2d 539 (1980); Shaw v. Westinghouse Electric Corp., 276 Pa. Super. 220, 419 A.2d 175 (Pa. Super. Ct. 1980); Lukus v. Westinghouse Electric Corp., 276 Pa. Super. 232, 419 A.2d 431 (Pa. Super. Ct. 1980); United Federation of Teachers Welfare Fund v. State Human Rights Appeal Board, 53 A.D.2d 808, 406 N.Y.S.2d 987 (1st Dept. 1976), *appeal denied*, 40 N.Y.2d 809 (1978); Liberty Mutual Insurance Co. v. State Human Rights Appeal Board, 61 A.D.2d 822, 402 N.Y.S.2d 218, 219 (2d Dept.), *appeal denied*, 44 N.Y.2d 644 (1978); *Minnesota*, 289 N.W.2d 396 (Minn. 1979), *appeal dismissed*, 444 U.S. 1041 (1980); *Mountain States*, 608 P.2d 1047 (Mont. 1979), *appeal dismissed*, 445 U.S. 921 (1980); Goodyear Tire & Rubber Co. v. Dept. of Industry, Labor & Human Relations, 87 Wis.2d 56, 273 N.W.2d 786 (Wis.Ct. App. 1978).

Only two courts have ruled to the contrary. *Pervel*, 468 F. Supp. 490 (D. Conn. 1978), *aff'd*, 603 F.2d 214 (2d Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980); International Ladies' Garment Workers' Union Local 111 v. Human Relations Commission, 53 Pa. Commw. 229, 417 A.2d 1279 (Pa. Commw. Ct. 1980).

Because the HRL is an essential component of the federal-state fair employment scheme of Title VII, to preempt it in these circumstances would alter, modify, invalidate and impair a "law of the United States." Thus, by the terms of ERISA § 514(d), § 514(a) does not apply, and the HRL survives.[12]

1. State fair employment laws are essential to Title VII's enforcement scheme.

The language and legislative history of Title VII, and decisions of this Court, confirm that Congress intended that state fair employment statutes be a necessary component of Title VII's scheme.

First, far from preempting state fair employment laws such as the HRL, Title VII expressly preserves the substantive protections such laws afford. Thus, Title VII does not

> exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State. . . .

42 U.S.C. § 2000e-7. *See* 42 U.S.C. § 2000h-4. States are explicitly permitted to enforce statutes that are more protective than Title VII. *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 134-135 (1976); *Thomas Publishing Co.* v. *Division of Human Rights*, 456 F. Supp. 1104, 1107 (S.D.N.Y. 1978). *See New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 67 (1980) (*"Gaslight"*).

12. Appellants do not assert, as the Court below mistakenly believed, that the HRL somehow "becomes a federal statute." A12. *See Pervel*, 468 F. Supp. at 493. Rather, to preempt the HRL would alter, modify, invalidate and impair Title VII itself.

Further, Title VII integrates state fair employment laws and procedures into the federal enforcement scheme. Where state fair employment laws are at least as protective as Title VII, state administrative agencies, such as the Division, are given the initial opportunity to resolve discrimination complaints. 42 U.S.C. § 2000e-5(c). *See,* 42 U.S.C. § 2000e-5(d). Complainants have no recourse to federal remedies until at least sixty days after proceedings have been commenced under the state law, and the Equal Employment Opportunity Commission ("EEOC") is required to defer to these states for initial investigation and resolution of discrimination complaints for this time period. In practice, deferral often lasts much longer. *Love* v. *Pullman Co.,* 404 U.S. 522, 526 (1972); *see Gaslight,* 447 U.S. at 64.[13] In addition, the EEOC must accord the findings of state administrative agencies "substantial weight" in its own investigatory proceedings. 42 U.S.C. § 2000e-5(b); *see* 29 C.F.R. § 1601.21(e) (1981). Finally, the EEOC is encouraged to enter into work-sharing agreements to "utilize the services" of local enforcement agencies, who may process, investigate and adjudicate classes of cases the EEOC otherwise would handle.[14] 42 U.S.C. § 2000e-8(b). *See also* 42 U.S.C. § 2000e-8(d); 29 C.F.R. §§ 1601.13(c), 1601.15(a) (1981). Thus, Congress not only preserved the substance of state fair employment laws, but also gave state administrative agencies a significant role in enforcing federal as well as state protections against discrimination.

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13. *See also* 29 C.F.R. § 1601.13(a)(4) (1981).

14. The EEOC has entered into such an agreement with the New York State Division of Human Rights and, according to the EEOC State and Local Division, Office of Field Services, with 67 other state and local fair employment agencies as well. *Cf.* 29 C.F.R. §§ 1601.13-1601.15 (1981).

The legislative history of Title VII reinforces the conclusion that Congress intended the states to be partners in the effort to eradicate employment discrimination. When it enacted Title VII, Congress was aware of state fair employment laws, including New York's HRL, and took pains to preserve them.[15] The two Senate floor managers emphasized that Title VII was drafted so states and the federal government could work together:

> When the bill is enacted, the State and the municipal agencies will continue to operate, and State laws will continue in force, except where they are inconsistent with title VII.[16]
>
> Ample provision has been made in title VII for the utilization of existing State fair employment laws and procedures to the maximum extent possible—section 708.[17]

Particularly indicative of Congress' intent that state enforcement be an integral part of Title VII is that the original bill did not require the sixty-day deferral to state fair employment agencies; Congress added this mandatory deferral to the final version, placing even greater reliance on state proceedings:[18]

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15. Experience under state laws was discussed in Congress at length, and those laws were used as models for much of Title VII. *See, e.g.*, 110 Cong. Rec. 7207 (1964) (statement of Sen. Clark); *id.* at 1635-1636 (statement of Rep. Reid); *id.* at 7205 (statement of Sen. Humphrey).

16. 110 Cong. Rec. 7205 (1964) (statement of Sen. Clark).

17. 110 Cong. Rec. 7243 (1964) (statement of Sen. Case). *See also* 110 Cong. Rec. at 7214 (Interpretative Memorandum of Sens. Clark & Case); *id.* at 7216 (response to memorandum of Sen. Dirksen); *id.* at 12,598 (statement of Sen. Clark).

18. *See* 110 Cong. Rec. 12,721-12,722, 12,723 (1964) (statement of Sen. Humphrey); *id.* at 12,819 (statement of Sen. Dirksen).

> [S]everal basic concerns . . . guided the labors of the negotiators. First, we were concerned that States and localities be afforded every opportunity to resolve these difficult problems of racial justice by means of their own agencies and instrumentalities. In this respect it is perfectly proper to describe the substitute package as a "States rights bill," and, I may say, a "States responsibilities bill."[19]

This Court has accordingly affirmed that state enforcement is an integral component of the federal fair employment scheme under Title VII. It has, for example, approved the EEOC's practice of deferring action on a complaint filed with it until a state deferral agency's proceedings are completed. *Love* v. *Pullman Co.*, 404 U.S. 522, 526 (1972); *see also, Mohasco Corp.* v. *Silver*, 447 U.S. 807, 816-817 (1980). In addition, in *Gaslight* the Court ruled that a party who has prevailed in proceedings initiated in the Division pursuant to § 2000e-5(c) is entitled to recover attorneys' fees under Title VII. The Court held that the language of 42 U.S.C. § 2000e-5(k), which allows attorneys' fees to prevailing parties "in any action or proceeding under this title," includes state administrative proceedings:

> Indeed, throughout Title VII the word "proceeding," or its plural form, is used to refer to all the different types of proceedings in which the statute [Title VII] is enforced, state and federal, administrative and judi-

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19. *Id.* at 12,724-12,725 (statement of Sen. Humphrey). *See* Mohasco Corp. v. Silver, 447 U.S. 807, 821 (1980):

> The history identifies only one reason for treating workers in deferral States differently from workers in other States: to give state agencies an opportunity to redress the evil at which the federal legislation was aimed, and to avoid federal intervention unless its need was demonstrated (footnote omitted).

> cial. The conclusion that fees are authorized for work done at the state and local levels is inescapable.
>
> 447 U.S. at 62-63 (footnote omitted).

See Alexander v. *Gardner-Denver Co.*, 415 U.S. 36, 47, 48-49 (1974). This Court found support for the result in *Gaslight* in Congress' intention that "Title VII's procedures and remedies . . . 'mes[h] nicely, logically, and coherently with the State and city legislation,' " *Gaslight*, 447 U.S. at 63, *quoting* 110 Cong. Rec. 7205 (1964), and that federal-state cooperation be the method of remedying employment discrimination, *id.* at 63-64.

Finally, this past Term, the extensive interconnection of state laws with Title VII was underscored by this Court's decision in *Kremer* v. *Chemical Construction Corp.*, 50 U.S.L.W. 4487 (May 17, 1982). There a New York State court's affirmance of an administrative agency determination on a deferred complaint was held *res judicata*, precluding litigation in federal court of the complainant's charges even after receipt of a right to sue letter.[20] Plainly, Congress and this Court have recognized state fair employment laws and adjudicative machinery to be part and parcel of Title VII's regulatory scheme.

2. Preemption of the HRL would alter, modify, invalidate and impair a federal statute.

In construing a statute, words must be given their ordinary meaning. *Diamond* v. *Diehr*, 450 U.S. 175, 182 (1981). Thus, the use of "alter, modify, invalidate" and "impair" in § 514(d) means what one would expect: noth-

20. Both the majority, 50 U.S.L.W. at 4490 n. 12, and dissenting opinions, *id.* at 4498, found that Congress intended that state fair employment laws be enforceable in full as part of the nation's battle against discrimination.

ing in ERISA—including § 514(a)—was intended to impinge upon or diminish any federal statute.

The comprehensive language of § 514(d) bears out that ERISA was not intended to override *any* aspect of federal law. Congress decided that ERISA "supersedes" state laws, 29 U.S.C. § 1144(a). However, as to federal laws, Congress more broadly provided that ERISA would not "alter, amend, modify, invalidate, or impair," as well as not "supersede," those laws. These additional terms must mean that federal statutes such as Title VII were not meant to be changed in any way by the enactment of ERISA, even if that change were less drastic than supersedure.

Preemption of the HRL alters, modifies, invalidates and impairs the enforcement scheme of Title VII. If, as Title VII expressly provides and this Court has held, proceedings under Title VII include those before state administrative agencies, *Gaslight,* 447 U.S. at 62-63, of necessity supersedure of the state law requiring those proceedings will impair or at least alter Title VII. At a minimum, it would eliminate an avenue to remedy employment discrimination that Congress envisioned as one of the multiple methods of vindicating federal fair employment policy. *Alexander* v. *Gardner-Denver Co.,* 415 U.S. at 47; *see North Haven Board of Education* v. *Bell,* 50 U.S.L.W. 4501, 4507 n. 26 (May 17, 1982).[21] Moreover, preemption of New

21. *See* 118 Cong. Rec. 3367-3373 (1972), where the Senate rejected an attempt to amend Title VII that "would provide that with certain named exceptions a charge filed with the Commission shall be an exclusive remedy for any person claiming to be aggrieved by a particular unlawful practice." *Id.* at 3368 (statement of Sen. Hruska). Even this amendment would have still permitted state fair employment commissions' proceedings. *Id.* at 3369.

York's prohibition of discrimination based on pregnancy also alters the substance of Title VII in contravention of ERISA § 514(d). Congress did not limit state statutes permissible under Title VII to only those offering identical protections to Title VII; state laws are invalid only to the extent they are "inconsistent with" or "permit or require the doing of an act" that would violate Title VII. 42 U.S.C. § 2000e-7.[22]

The critical factor here is that none of the circumstances surrounding the enactment of Title VII suggests that it was Congress' intent for the federal government alone to regulate employment discrimination. *See* 42 U.S.C. § 2000h-4. Instead, the statute it enacted, the machinery it established, and subsequent legal history confirm Congress' aim to preserve and supplement states' traditional police power to prevent unlawful discrimination, and their authority to protect their citizens in areas of traditional local concern.

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22. When it enacted Title VII, Congress was cognizant that many state fair employment statutes—including New York's HRL—offered more protection than Title VII:

> I am disappointed that title VII is not as effective as it should be. In fact, the Equal Employment Opportunities Commission does not have as much power as some State fair employment practices commissions such as the one in New York. However, this represents an important first step in an area where the Federal Government previously has refused to intervene.

110 Cong. Rec. 1643 (1964) (statement of Rep. Ryan). And Congress' understanding of the greater protections afforded by state fair employment laws did not change after ERISA was enacted. *See*, S. Rep. No. 331, 95th Cong., 1st Sess. at 3 (1977) (Report to accompany S. 995, to amend Title VII to prohibit discrimination based on pregnancy): "25 States presently interpret their own fair employment practices laws to prohibit sex discrimination based on pregnancy and childbirth. Some of these States, which now provide *greater protection* for women workers than Title VII does under the *Gilbert* case, have laws which specifically refer to pregnancy" (emphasis supplied).

See Gaslight, 447 U.S. at 67. On the subject of ERISA preemption, this principle is buttressed by this Court's admonition that "our analysis of this problem [of ERISA preemption] must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Alessi*, 451 U.S. at 522. *See also Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981); *Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132, 142 (1964).

In sum, none of Title VII's provisions, including those that expressly allow states to give workers greater substantive protections than afforded by Title VII itself, may be affected *at all* by ERISA. However, the Court of Appeals' decision yields just such a result. The decision would prevent states from protecting their workers not only against pregnancy discrimination, but also against discrimination by plans subject to ERISA based upon marital status, disability, or other grounds that state legislatures determine are necessary to guarantee workers' security. In addition, states would be powerless to prohibit discrimination by ERISA-covered employers not within Title VII's jurisdiction, for example, employers who employ fewer than 15 workers. Elimination of these state protections would leave hundreds of thousands of workers vulnerable to discrimination that state legislatures have prohibited. The Court of Appeals' result would alter, modify, invalidate and impair Congress' integrated system of protection for workers. In fact, the Court of Appeals' decision would, in effect, repeal by implication 42 U.S.C. § 2000e-7 and § 2000h-4—a result for which there is no basis in ERISA and which flies in the face of ERISA's legislative

history and purpose. *See Kremer* v. *Chemical Construction Corp.*, 50 U.S.L.W. at 4489.

Moreover, the Court of Appeals' decision, if upheld, would not be limited to preempting state laws that offer greater protections than Title VII. The decision's basis, that "only federal laws are protected from preemption by ERISA" (A12), does not permit any principled distinction between preemption of pregnancy discrimination and preemption of race, religious or national origin discrimination prohibited by state law. The necessary result of an affirmance by this Court would be that all discrimination complaints filed with the EEOC concerning pension or welfare benefit plans against employers who maintain such plans could not be deferred to the Division under § 2000e-5 (c), because the Division would be without authority "to grant or seek relief" from the plan's discriminatory practices. New York's HRL would be unenforceable in its entirety as to such employers' pension or welfare benefit plans. Because the EEOC is not empowered to hold adjudicatory hearings or grant relief, discrimination complaints against employers covered by ERISA would have to be brought in federal court. This would be antithetical to Congress' intent to preserve state laws and proceedings, and Congress' desire to alleviate the burden on the federal courts.[23]

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23. Congress wished to "make it easier for a plaintiff of limited means to bring a meritorious suit." *Gaslight*, 447 U.S. at 63, *quoting* 110 Cong. Rec. 12,724 (1964) (remarks of Sen. Humphrey). State laws and proceedings are often informal and allow *pro se* representation. *See* HRL § 297.1. In addition, "to some extent at least, there would be a saving in the Federal budget in those areas where State laws are effective, discrimination is outlawed, and discriminators are prosecuted." 110 Cong. Rec. 7205 (1964) (statement of Sen. Clark). *See also* H.R. Rep. No. 238, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2146.

B. Legislative history of ERISA and Title VII demonstrates Congress' desire to preserve state fair employment laws.

Although ERISA's legislative history is evidence of congressional intent to preempt state laws regulating pension or welfare benefit plans, that history also underscores that Congress did not intend that § 514(a) would preempt state fair employment laws.

The pension reform legislation that ultimately became ERISA was introduced in the Senate as S. 4 on September 17, 1973.[24] In this original version, only state laws that related to the "subject matters" regulated by ERISA were to be superseded.[25] In addition, the bill, like the final enacted version, provided that nothing in ERISA would "alter, amend, modify, invalidate, impair, or supersede any law of the United States. . . ."[26]

Early in the debates on S. 4, Senator Mondale questioned whether ERISA would prohibit race, sex and other discrimination in employee pension benefit plans. In light of an assurance from Senator Williams, the bill's co-sponsor, that unlawful discrimination by ERISA-covered employers would be fully prohibited by § 703(a) of Title VII (42 U.S.C. § 2000e-2[a]), Senator Mondale did not offer his planned amendment to ERISA to incorporate non-discrim-

24. S. 4, 93d Cong., 1st Sess., 119 Cong. Rec. 29,890 (1973).

25. S. 4, § 609(a), *id.* at 29,902 (1973). In the original bill certain provisions of the Welfare and Pension Plans Disclosure Act of 1958 were to remain in effect, and they too were to supersede conflicting state laws.

26. S. 4, § 609(a)(3), *id.* at 49,902. *See also* Amendment No. 496, § 699(a), 119 Cong. Rec. 30,011, 30,036 (1973).

ination into the bill's basic requirements.[27] Senator Williams articulated the rationale for not including such provisions in ERISA:

> Although I fully share your concern for full enforcement of nondiscrimination requirements affecting pension and profit sharing plans, I believe that the thrust toward centralized administration of nondiscrimination in employment must be maintained. And I believe this can be done by the Equal Employment Opportunity Commission under terms of existing law.[28]

Congress was well aware that "existing law" included preservation and incorporation of state fair employment laws. Senator Mondale, agreeing that his amendment was unnecessary, specifically alluded to the fact that in 1972 Congress amended Title VII, "further consolidating equal employment jurisdiction in the Equal Employment Opportunity Commission,"[29] a reference to the Equal Employment Opportunity Act of 1972.[30] The purpose of the 1972 Act was to strengthen the enforcement authority of the EEOC, and

> to implement in a meaningful way the national policy of equal employment opportunity for employees without discrimination because of race, color, religion, national origin or sex.[31]

To effectuate this purpose, Congress in the 1972 Act placed even greater reliance on state administrative proceedings

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27. 119 Cong. Rec. 30,409-30,410 (Sept. 19, 1973) (statements of Sens. Mondale, Williams).

28. *Id.* at 30,409 (statement of Sen. Williams).

29. *Id.*

30. Pub. L. No. 92-261, 1972 U.S. Code Cong. & Ad. News (86 Stat.) 103.

31. H.R. Rep. No. 238, 1972 U.S. Code Cong. & Ad. News at 2138.

than it had in 1964. It amended § 706 of Title VII, 42 U.S.C. § 2000e-5, to require that

> [the EEOC] in determining whether reasonable cause exists . . . shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section.

The House Education and Labor Committee's Report on the bill that became the 1972 Equal Employment Opportunity Act stated that "the law would not usurp the State agencies, and undoubtedly a large number of cases would be settled at the State level."[32] Pointedly, the report goes on to emphasize that

> *existing law* relating to actions filed under State or local law has been retained. In such cases, the Commission will not assume jurisdiction for sixty days after the commencement of the action under state or local authority (sec. 706(c)) (emphasis supplied).[33]

Thus, when considering ERISA in 1973, Congress was well aware that Title VII preserved state law, and that, if nondiscrimination in employee benefit plans would be enforced by the EEOC, it would include enforcement by state authorities.[34]

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32. H.R. Rep. No. 238, 1972 U.S. Code Cong. & Ad. News at 2143.

33. *Id.* at 2145.

34. The colloquy between Senators Mondale and Williams was repeated nearly verbatim in the House between Representative Abzug and the sponsor of the House bill, Representative Dent. 120 Cong. Rec. 4726 (1974). These prepared remarks are entitled to more weight in construing Congress' intent than spontaneous statements. *See* North Haven Board of Education v. Bell, 50 U.S.L.W. at 4504. Evidently ERISA's sponsors wished to ensure that the legislative history would unequivocally demonstrate Congress' intent to keep ERISA-covered plans subject to fair employment laws.

The 1978 Amendment to Title VII (the Pregnancy Discrimination Act) provides further support for the conclusion that Congress never intended ERISA to supersede state fair employment statutes. The House Report on its version of the Pregnancy Discrimination Act emphasized that the Act would not have a significant effect on many employers because many state laws already prohibited pregnancy discrimination.[35] The House adopted the United States Labor Department's estimate of the overall cost to employers from the Act because that estimate did

> *not* include workers *already* covered for pregnancy disability (either because of State law requirements or because their employers have chosen to provide such coverage), a factor all of the higher estimates fail to take into account (emphasis in original).[36]

Congress knew that the vast majority of employers and benefit plans which would be covered by the Pregnancy Discrimination Act were also covered by ERISA, yet Congress created no exception for ERISA-covered plans when it enacted the Pregnancy Act:

> Since title VII does not preempt State laws which would not require violating title VII . . . these States would continue to be able to enforce their State laws if this bill were enacted.[37]

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35. H.R. Rep. No. 948, 95th Cong., 2d Sess. 10-11, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4749, 4758-4759.

36. *Id.*, H.R. Rep. at 9, 1978 U.S. Code Cong. & Ad. News at 4757. In addition, the House did not feel a protracted delay in implementation of the Act would be appropriate because the bill "is merely reestablishing the law as it was understood prior to *Gilbert* . . . and as it now exists in many states. . . ." *Id.*, H.R. Rep. at 8, 1978 U.S. Code Cong. & Ad. News at 4756; *see* S. Rep. No. 331, 95th Cong., 1st Sess. at 8, 10-11 (1977).

37. S. Rep. No. 331, 95th Cong., 1st Sess. at 3 n. 1 (1977).

C. This Court's decision in *Alessi* does not affect this case.

Last Term, in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), this Court was faced with a challenge to an employer's practice of reducing pension benefits for which retirees were eligible under an ERISA-covered pension plan by the amount of workers' compensation awards the retirees received. The employees asserted that this practice violated the terms of ERISA itself, as well as a New Jersey statute that prohibited such offsets by workers' compensation benefits. N.J. Stat. Ann. § 34:15-29 (West 1959 & Supp. 1981-1982). This Court rejected the first argument and concluded that ERISA permits pension benefits to be offset by workers' compensation awards for which a retiree is eligible. *Alessi*, 451 U.S. at 511-517. The Court also held that the New Jersey law was preempted by ERISA § 514(a). *Id.* at 521-526.

Without carefully examining the *Alessi* rationale, particularly the detailed analysis of ERISA's legislative history and purpose, the Court of Appeals in this case simply transposed the *Alessi* result to the present facts and concluded that preemption was compelled (A10). This conclusion has no basis in ERISA's language or history (*see* Points IA and B, above) and no basis in the language of the *Alessi* opinion. *See Westinghouse Electric Corp.* v. *Maryland Commission on Human Relations*, 520 F. Supp. 539, 548-549 (D. Md. 1981).

First, the state statutes at issue here and in *Alessi* are entirely different. *Alessi* concerned a New Jersey law that specifically regulated the amount and nature of pension benefits; the HRL is a statute of general applicability prohibiting employment discrimination. ERISA was enacted

precisely to regulate the former situation; by its terms, it has nothing to do with the latter.

Second, the dispositive issue in *Alessi* was whether Congress had permitted or prohibited a particular method of calculating pension benefits—integration of workers' compensation awards. Though ERISA is silent on this precise question, this Court found ample evidence in the legislative history and the fact that ERISA allows integration of other types of benefits to conclude that Congress intended to allow integration of workers' compensation awards. 451 U.S. at 514-516. The issue here, by contrast, is discriminatory denial of disability benefits to a group of employees on account of their sex. Far from approving this practice, Congress gave no indication that it wished to unsettle existing law barring unlawful discrimination by employee benefit or pension plans.

As evidence that Congress wished to permit integration of awards, the *Alessi* Court recognized that when enacting ERISA, Congress "embraced" a contemporaneous Internal Revenue Service ruling permitting integration of workers' compensation benefits. 451 U.S. at 521. By contrast, the EEOC has consistently taken the position that state laws prohibiting discrimination—including those more extensive than Title VII—are not superseded by ERISA.[38]

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38. *See* Brief of the EEOC, *Amicus Curiae*, filed with the Second Circuit on Appeal at 13-27 (April 28, 1980); Response of the EEOC, *Amicus Curiae*, to Delta Air Lines Petition For Reconsideration at 8-9 (Sept. 14, 1981); *Bucyrus-Erie*, 599 F.2d at 212. This Court has noted that the views of the agency principally responsible for enforcing a statute—including views presented as *amicus curiae*—are of significant weight in construing that statute. *North Haven Board of Education* v. *Bell*, 50 U.S.L.W. at 4503 n. 12; Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 14-15 (1979).

Third, the New Jersey law in *Alessi* "directly clashed" with federal policy concerning calculation of pension benefits. 451 U.S. at 526 n. 22. Likewise, the decision to allow integration of workers' compensation benefits was entirely consistent with ERISA's express allowance of integration of other government benefits, *viz.*, Social Security and Railway Labor Act benefits. By contrast, the HRL not only does not *impinge* on ERISA, but rather *furthers* the federal policy of ERISA and Title VII: protection of workers and equal access to benefits.

Finally, the *Alessi* decision did not address, much less resolve, the issue presented by this case: ERISA's effect on *federal* statutes. In *Alessi*, this Court only decided that the New Jersey statute "related to" the employers' pension plans, and therefore was preempted pursuant to § 514(a). 451 U.S. at 523-524. Here, whether the HRL "relates to" appellees' benefit plans is not dispositive. Rather, appellants assert that the HRL retains its effect through the exemption of § 514(d).[39]

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39. For the same reasons, the Court of Appeals' conclusion that *Alessi* is a doctrinal development that effectively overruled this Court's summary affirmances in *Minnesota* and *Mountain States* is incorrect. The fact that these cases also involve entirely different issues than *Alessi* is underscored by the fact that *Alessi* does not even mention, much less discuss, *Minnesota* or *Mountain States*. As this Court has decided to give plenary consideration to the question of whether ERISA preempts state fair employment laws, appellants do not rely on the *Minnesota* and *Mountain States* summary affirmances. *See* Washington v. Yakima Indian Nation, 439 U.S. 463, 476 n. 20 (1979). However, as *Alessi* does not affect *Minnesota* and *Mountain States*, they are still of precedential value. *See* Edelman v. Jordan, 415 U.S. 651, 671 (1974).

II. ERISA Does Not Preempt the DBL.

Long before Congress imposed even minimal regulation over employee welfare and pension plans, New York and other states guaranteed workers a measure of security for occurrences which interfere with their employment. When Congress enacted ERISA, it was aware of these state social welfare statutes, including New York's DBL, and expressly preserved them:

> The provisions of this subchapter shall not apply to any employee benefit plan if—
>
> * * * *
>
> (3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws.

ERISA § 4(b), 29 U.S.C. § 1003(b). Thus, ERISA insulates from preemption New York's authority to impose substantive requirements in the area of disability benefits.

Since 1949, New York's DBL has required employers to provide benefits for employees disabled from non-job-related causes. All covered employers must provide up to twenty-six weeks of benefits for all non-occupational disabilities encountered in any consecutive fifty-two week period.[40] When the *Delta* action was brought, the DBL

40. A covered employer is one who employs at least one employee for at least thirty days in any calendar year. DBL § 202. An employee must be employed for at least four consecutive weeks to be eligible to receive disability benefits. DBL § 203. Benefits are paid beginning with the eighth consecutive day of disability (DBL § 204.1), subject to various restrictions (DBL § 205) and limitations (DBL § 206). All employees contribute a maximum of one-half of one percent of their wages, not to exceed thirty cents per week, to the cost of providing disability benefits. DBL § 209.3. The employer bears the remaining cost. DBL § 210.

limited employers' obligations in connection with pregnancy disabilities to providing a maximum of eight weeks of benefits.

Under the DBL, New York's employers must guarantee payment of disability benefits in one of four ways: (1) insurance with the state insurance fund, DBL § 211.1; (2) insurance with a private accident or health insurance company, DBL § 211.2; (3) self-insurance, provided the employer furnishes proof of ability to pay benefits including, at a minimum, a deposit of securities or a bond of at least $50,000, DBL § 211.3; or (4) maintenance of a plan or agreement with an insurance carrier that the Board determines provides benefits at least as favorable as those required by the DBL at no greater cost to employees, DBL § 211.5.

The airlines challenged the applicability to them of the statutory obligation to pay pregnancy disability benefits, claiming the DBL was preempted by ERISA. They asserted that preemption followed from the fact that their various employee benefit plans were not "maintained *solely* for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability laws" (§ 4(b)(3)) because their plans went beyond what the DBL required and included accident, health or medical benefits as well as benefits for non-job-related disabilities. JA 31, ¶ 9; JA 51, ¶ 81. Thus, the issue in *Delta* was whether, if an employer provides disability benefits required by the DBL in the same "plan" as other benefits not required by the DBL, the plan falls within ERISA's

§ 4(b)(3) exemption for plans "maintained solely for the purpose of complying" with a disability insurance law.[41]

Both lower courts recognized that the language of § 4(b)(3) and ERISA's legislative history do not provide definitive answers to this question (A60, A90). The *Delta* district court, concluding that the airlines' argument would lead to the untenable result that numerous employers "would escape the operation of the workmen's compensation laws altogether" (A90), found that

> ERISA and state workmen's compensation laws create independent and concurrent obligations and that those provisions of an employee benefit plan which are maintained to comply with such state laws are excluded from ERISA.

To the contrary, the Court of Appeals construed § 4(b)(3) as preserving only benefit plans that are administered in a separate unit, independently of all other benefits provided to employees. The court recognized (A58)

> that many aspects of benefits plans generally, and of welfare benefits plans in particular will go unregulated under this regime of broad preemption, and that § 514(a) may therefore permit abuses that Congress might otherwise have wished to avert.

Despite recognizing this expression of Congress' intent, the court decided that for employers who "maintain more complex benefits systems that do not employ a separate

41. The lower courts also addressed the airlines' contention that they provided disability benefits not "solely" to comply with the DBL, but for other reasons (A65). The Court of Appeals rejected this argument, finding that "Congress did not intend § 4(b)(3) to empower employers to evade state regulation by engaging in a swearing contest concerning their motives." *Id.*

'plan' for disability, [t]he DBL is preempted *in its entirety* . . . and is wholly unenforceable against them" (emphasis supplied) (A66).[42]

The history and purpose of ERISA demonstrate that the district court's decision is the correct one. The Court of Appeals' decision exalts form over substance, and is at odds with ERISA's declared policy of ensuring that workers are protected when they are unable to work.

First, the obvious purpose of ERISA § 4(b)(3) was to preserve states' authority to regulate workers' compensation, unemployment compensation and disability benefits. Because of this, and because ERISA does not require employers to provide any particular benefits in their welfare or pension plans, § 4(b)(3) allows states to require that benefits be provided workers in these three areas.

New York's DBL is one prong of the tri-partite system established by New York's Legislature to assist workers when their earning capacity is adversely affected:

> The Disability Benefits statute is broad in concept and general in terms. It was designed to assist the employee of the State who suffered disability by bridging the gap between the Workmen's Compensation Law and the Unemployment Insurance Law. Unlike the Workmen's Compensation Law, the Disability Benefits

42. The Court of Appeals believed Congress' primary concern in enacting ERISA was to ensure comprehensive regulation of benefits by some governmental authority, whether state or federal (A62-A64). In New York, thorough regulation of disability plans is statutorily guaranteed, as the Board must regulate, approve and oversee the administration of all disability benefits options. *See* DBL §§ 208, 211, 220, 221, 226, 234. A "single administrative unit" will not ensure any additional state oversight.

> Law contains no requirement that the cause of a disability arise out of and in the course of employment. It contemplates a broad social coverage to protect the employee against the hazard of sickness and disability which interfere with and prevent his continuance in active employment and which can occur and do occur both within and outside of working hours.

Flo v. *General Electric Co.*, 7 N.Y.2d 96, 99 (1959). In contrast, ERISA was designed to guarantee workers' expectations of receiving *benefits*, primarily *after* their earning capacity has ceased. *See, e.g.*, 29 U.S.C. § 1001. Thus, it is understandable that Congress would not wish to allow ERISA to erase state disability, workers' compensation or unemployment statutes, and § 4(b)(3) prevents the creation of just such a void. This Court should not countenance a judicial construction that achieves what Congress avoided, particularly as

> [p]reemption of state law by federal statute or regulation is not favored "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."

Chicago & North Western Transportation Co. v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1980), *quoting Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132, 142 (1964).

Second, the legislative history of § 4(b)(3) supports the district court's conclusion that ERISA and the DBL create concurrent obligations. The Senate's initial ERISA legislation[43] provided that Titles V and VI of the bill, which imposed requirements concerning "Disclosure and Fiduciary Standards" and "Enforcement" (the only titles ap-

43. S. 4, § 104(d), 119 Cong. Rec. 29,890, 29,893 (1973).

plicable to welfare, as opposed to pension benefit plans), would apply to plans covered by ERISA's predecessor statute, the Welfare and Pension Plans Disclosure Act of 1958 ("WPPDA").[44] The WPPDA did not apply to plans

> established and . . . maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation disability insurance laws [*sic*].

29 U.S.C. § 303(b)(2). The House, in the section of its original ERISA legislation that delineated ERISA's coverage, incorporated verbatim this language from the WPPDA.[45] Thus, from the legislation's inception, Congress intended to preserve states' ability to require employers to provide disability benefits.

The exclusion of workmen's compensation, unemployment compensation and disability insurance plans by § 4(b)(3) was not discussed in any of the debates or reports on ERISA. However, the history surrounding the nearly identical section of the WPPDA, 29 U.S.C. § 303(b)(2), demonstrates Congress' intent to allow states freedom to regulate plans in the area of disability benefits.

In 1958, Congress responded to the need for regulation of pension and welfare benefits plans and enacted the WPPDA. This statute evolved from Senate hearings and studies on pension and welfare benefit plans conducted during 1954 and 1955, which examined experience under

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44. Pub. L. No. 85-836, 72 Stat. 997, codified at 29 U.S.C. §§ 301-309 (1975 Ed.). This law was repealed by § 111(a)(1) of ERISA, 29 U.S.C. § 1031(a)(1).

45. H.R. 2, as amended by H.R. 12906 § 101(b)(3), 93d Cong., 2d Sess., 120 Cong. Rec. 4319, 4322 (1974).

state and federal laws, particularly state disability insurance statutes. The Committee report on these hearings acknowledged the existing state regulation of disability insurance:

> Temporary disability insurance, as distinguished from workmen's compensation insurance, is not provided by Federal statute except in a few instances, such as railroad retirement, maritime and certain phases of State unemployment insurance laws. Four States do require such insurance: Rhode Island has an exclusively publicly operated plan; California, New Jersey, and New York permit coverage through insurance companies, a State fund, or self-insurance.[46]

The Senate Committee report on the bill that became the WPPDA underscores Congress' awareness of existing state disability benefits laws:

> Others, like the temporary disability insurance laws of a few of the States, are designed to replace, in part, the loss of the wages of the family breadwinner during periods of temporary disability.[47]

Thus, when Congress created the exemption in the WPPDA for "disability insurance laws" it had four state laws in mind, including New York's DBL. Congress knew that three of the laws did not require a separately operated plan, but provided alternatives—"coverage through insurance companies, a State fund, or self insurance"—that would not necessarily take the form of a separate administrative unit. This history of the WPPDA is telling evi-

46. S. Rep. No. 1734, 84th Cong., 2d Sess. 16 (1956).

47. S. Rep. No. 1440, 85th Cong., 2d Sess. 6, *reprinted in* 1958 U.S. Code Cong. & Ad. News 4137, 4142.

dence of Congress' intent in ERISA § 4(b)(3), particularly as that section was directly derived from the WPPDA.[48] *See, North Haven Board of Education* v. *Bell*, 50 U.S.L.W. 4501, 4505 (May 17, 1982); *New York Telephone Co.* v. *New York State Department of Labor*, 440 U.S. 519, 541 (1979);[49] *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978).

Consequently, the Court of Appeals' reading of ERISA § 4(b)(3) to preempt state disability laws unless employers maintain the required benefits in a separate unit contradicts Congress' decision to preserve state disability laws which give an employer a variety of options. The Court of Appeals' holding is especially untenable because it relies on Rhode Island's system of requiring employers to participate in a state administered fund, which the court believed to be the paradigm of permissible state regulation under § 4(b)(3) (A61-A62). However, when Congress enacted the WPPDA and ERISA, it knew of and intended to preserve not only Rhode Island's statute, but state laws that give employers other options for providing disability benefits. *See Standard Oil of California* v. *Agsalud*, 442 F.

48. The only difference in the language of the two statutes is that the WPPDA excluded a plan that "was established and is maintained" solely to comply with the three types of statutes, 29 U.S.C. § 303(b)(2), while ERISA excludes a plan that "is maintained" to comply with workmen's compensation, unemployment compensation and disability insurance laws. ERISA also made a grammatical change, inserting "or" between "unemployment compensation" and "disability insurance." 29 U.S.C. § 1003(b)(3).

49. The *New York Telephone* case is particularly apposite. There, this Court upheld New York's right to provide unemployment insurance to striking workers under its unemployment insurance law in the face of a challenge that the law was preempted by the National Labor Relations Act. The Court was persuaded, *inter alia*, by the fact that Congress was aware of the New York law when it passed the Social Security Act—a companion statute to the NLRA—and did not prohibit it. *See* 440 U.S. at 541-544.

Supp. 695, 705 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd*, 102 S. Ct. 79 (1981) (*"Agsalud"*).

Third, an amendment to ERISA proposed in 1978 supports the district court's conclusion.[50] It would have amended ERISA § 4(b)(3) to add health insurance to the other three areas in which states may legislate.

The joint hearings on this amendment illustrate that Congress believed the effect of § 4(b)(3) was to save state disability insurance, workers' compensation and unemployment compensation laws from preemption. The amendment was introduced specifically to overturn the *Agsalud* decision, in which the District Court for the Northern District of California held that ERISA preempts the Hawaii Prepaid Health Care Act, Haw. Rev. Stat. §§ 393-1—393-51.[51] At the hearings on the bill, Senator Inouye, its co-sponsor, stated that the legislation's purpose was

> to insure that the State of Hawaii's Prepaid Health Care Act will be included in the category of laws *exempt from the preemption provision* of [ERISA] (emphasis supplied).[52]

---

50. S. 1383, 95th Cong., 1st Sess., 123 Cong. Rec. 12169 (1977).

51. Judge Renfrew held that although "all state laws relating to private employee benefit plans are preempted except workmen's compensation, unemployment compensation, and disability insurance laws," 442 F. Supp. at 698, Hawaii's law was not a disability insurance law because it insured against all types of illnesses, whether disabling or not. *Id.* There is no dispute that the DBL is a disability insurance law within the meaning of § 4(b)(3) (A56).

52. *ERISA Improvements Act of 1978: Joint Hearings on S. 3017 (and related bills) Before the Subcomm. on Labor of the Senate Comm. on Human Resources and the Subcomm. on Private Pension Plans and Employee Fringe Benefits of the Senate Comm. on Finance*, 95th Cong., 2d Sess. 201 (1978) (statement of Sen. Inouye).

Further, the bill

> would specifically modify ERISA so as to provide that innovative health insurance laws such as Hawaii's would be treated in the same manner as disability insurance laws, worker's compensation laws, and unemployment compensation laws, and thereby be excluded from preemption.[53]

In subsequent discussion of the bill, several Senators confirmed that it was also their understanding that, when enacted, ERISA was intended to leave state disability laws intact:

> *Senator Bentsen.* [A]s I understand the legislation proposed by Senator Inouye and Senator Matsunaga, it is not really carving out new territory, because you have now got workmen's compensation, disability insurance, and unemployment insurance, where you do not have preemption and the States have a paramount force in how those particular plans are drafted. . . .
>
> *Senator Inouye.* The Senator is very correct, sir. This issue is not anything new. As you have indicated, we would like to be treated in the same manner as disability insurance, and workmens' compensation and unemployment compensation.
>
> * * * *
>
> *Senator Williams.* It seems to me that we have several different themes under our federal system for the interaction of Federal and State laws.
>
> * * * *
>
> And in the general coverage section of ERISA, Congress made it clear that ERISA was not to apply to only a few types of plans that might otherwise have been deemed to be covered by ERISA. These are plans

53. *Id.* at 210.

> maintained solely for the purpose of complying with applicable State laws dealing with workers' compensation, unemployment compensation, or disability insurance.
>
> The Hawaii law, though, deals with health care; it requires employers in the state to provide health care coverage for their employees. *That is different than workers' compensation, unemployment compensation or disability insurance, and so the preemption question arises* (emphasis supplied).[54]

This postenactment history of ERISA shows what Congress thought § 4(b)(3) accomplished, and cannot be ignored in interpreting the statute. *North Haven Board of Education* v. *Bell*, 50 U.S.L.W. at 4507.

Fourth, the implications of the Court of Appeals' decision are directly contrary to legislatively expressed policy. Under the Court of Appeals' decision, New York may not enforce its DBL unless the *employer* chooses to provide statutory disability benefits in a separate administrative unit. As a result, under existing law, an employer could avoid the DBL's obligations merely by electing to set up a single system—paying various benefit claims from one office, purchasing various types of insurance from a single insurer, or providing disability benefits in a single package along with any other benefit (for example, health insurance). The Court of Appeals has made protection afforded workers by state law depend neither on the requirements of that law, the DBL, nor on the language or intent of ERISA, but on the employer's judgment or good will. The

54. *Id.* at 227-228. S. 1383 was not enacted in 1978. In Congress' next session, an amendment to exempt the Hawaii Act from preemption was again introduced in the Senate as part of the ERISA Improvements Act of 1979. This legislation also failed to become law.

possibilities are legion for action by employers to avoid, by relatively simple expedients, the legislature's mandate that New York workers be protected when disabled. This result cannot have been what Congress had in mind.[55]

By requiring a "separate administrative unit," the Court of Appeals has also eliminated the flexibility New York's legislature built into the DBL by allowing employers to choose from a variety of options to provide statutory benefits. This flexibility allows employers and employees to select the least expensive method to provide maximum benefits desired by workers. The foreseeable—and unconscionable—result of the Court of Appeals' decision is that disability benefits will "go unregulated" in New York (A58).

Finally, even if the language of § 4(b)(3) could arguably be said to support the Court of Appeals' holding, that holding creates a conflict between the DBL and ERISA that is manifestly avoidable and demonstrably bad policy in terms of express federal and state aims. This Court has repeatedly held that state and federal regulatory schemes should be harmonized, if at all possible. *Kremer* v. *Chemical Construction Corp.*, 50 U.S.L.W. at 4489; *Merrill*

55. Affirmance of the Court of Appeals' decision also potentially could wreak havoc on state workers' compensation statutes. Of the 49 states that require employers to provide workers' compensation, only three (Nevada, North Dakota, and Wyoming) require that benefits be provided through a separate, state-administered workers' compensation fund. The remaining states all allow employers to select from several options to provide mandatory benefits, including purchasing private insurance or self-insuring. 4 A. Larson, *Workmen's Compensation Law* § 92.10 & App. A, Table 7 (1982). *See* Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 932 (1978).

Lynch, Pierce, Fenner & Smith, Inc. v. *Ware*, 414 U.S. 117, 127 (1973). There is no obstacle to enforcing the DBL, as none of its provisions clash directly or indirectly with any requirements of ERISA. Rather, upholding the DBL is desirable in terms of ERISA's—and New York's—overall purpose of guaranteeing the well-being and security of workers. The strained, technical reading of ERISA given by the Court of Appeals is, in the final analysis, a thoroughly unnecessary triumph of form over substance.

Conclusion

For all of the above reasons, the judgments of the Court of Appeals should be reversed.

Respectfully submitted,

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June 30, 1982

Supplemental Appellant's Brief

No. 81-1578

IN THE

Supreme Court of the United States

October Term, 1981

WERNER H. KRAMARSKY, *etc., et al.*,
Appellants,

v.

DELTA AIR LINES, INC., *et al.*,
Appellees.

WERNER H. KRAMARSKY, *etc.*,
Appellant,

v.

BURROUGHS CORPORATION,
Appellee.

WERNER H. KRAMARSKY, *etc., et al.*,
Appellants,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Second Circuit

MOTION UNDER RULE 38.4 FOR DIVIDED ARGUMENT

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No. 81-1578

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On Appeal from the United States Court of Appeals for the Second Circuit

MOTION UNDER RULE 38.4 FOR DIVIDED ARGUMENT

Pursuant to Rule 38.4 of the Revised Rules of this Court, appellants Kramarsky, Anderson and State Division

of Human Rights (hereinafter collectively "the Division") respectfully move this Honorable Court for divided argument.

This Court noted probable jurisdiction in this matter on April 19, 1982 to consider *inter alia* whether the Employee Retirement Income Security Act of 1974, P.L. 93-406, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), preempts the Human Rights Law, N.Y. Executive Law Art. 15. Similar questions created conflict in the circuits. *Compare Pervel Industries, Inc.*, 468 F. Supp. 490 (D. Conn. 1978), *aff'd*, 603 F.2d 214 (2d Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980), *with Bucyrus-Erie Co.* v. *Dept. of Industry, Labor and Human Relations*, 559 F.2d 205 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980). Although this conflict was resolved promptly by summary decisions of this Court sustaining state prohibitions against discrimination, see *Minnesota Mining & Mfg. Co.* v. *Minnesota*, 444 U.S. 1041 (1980); *Mountain States Tel. & Tel. Co.* v. *Commissioners*, 445 U.S. 921 (1980); see also *United Federation of Teachers Welfare Fund* v. *State Human Rights Appeal Board*, 449 U.S. 803 (1980), the court below held *Minnesota* overruled *sub silentio* by this Court's decision in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

The question whether ERISA preempts the Human Rights Law, having bred uncertainty and disagreement, appears to deserve the fullest possible presentation.

The Division is an agency in the Executive Department of the State of New York, which is headed by the Governor, and is authorized by law to appear in its own behalf as a

party by its own counsel. Human Rights Law §§ 295.3, 298.*

In the court below, the Attorney General of the State of New York represented only the Workers' Compensation Board and its Chair, presenting written and oral argument in support of the Disability Benefits Law, N.Y. Workers' Compensation Law Art. 9, against a challenge based on ERISA. All written and oral argument in support of the Human Rights Law, declared preempted by the District Courts, was presented by the Division's General Counsel.

After the court below handed down the decision here on appeal, the Division's General Counsel sought and obtained a stay of all declaratory relief pending review by this Court, served and filed notices of appeal to this Court, pursuant to 28 U.S.C. § 1254(2), on behalf of the Division, and thereafter jointly with the Attorney General docketed this appeal.

On February 22, 1982 the Division's General Counsel filed in this Court a notice of appearance as the Division's counsel of record, and thereafter prepared the attached joint appendix and brief, pursuant to instructions approved by the Governor's office.

Notwithstanding such approval, on June 22, 1982 the Division received a photocopy of a letter from Peter Bien-

* While the Attorney General may prosecute and defend certain actions on request of the Division, N.Y. Executive Law § 63.9, to date no such request has been made in this appeal. The legislative history of that provision, which was enacted when the Division's predecessor agency was created, states that it gives the Division the option to appear by its own attorney. See N.Y. Leg. Doc. No. 6 (1945) at 37.

stock, Esq., Assistant Attorney General, New York State Department of Law, to Hon. Alexander L. Stevas, Clerk of this Court, requesting him not to accept for filing any submission by the Division. This letter is reproduced and made part of this motion as Exhibit A.

The Division recognizes of course the power of the Attorney General to defend state statutes from constitutional challenges. The breadth of this unquestioned authority, however, does not limit the Division's statutory right to representation by its counsel but augments independently and concurrently the Division's own competence with respect to interpretation of the Human Rights Law and control of proceedings thereunder.

Such competence will be uniquely helpful to this Court in these cases, because the Division's interpretation and application of the Human Rights Law is here at issue. All these cases were brought and maintained to attack the Division's reading of the statute as prohibiting discrimination in terms, conditions or privileges of employment against workers who are pregnant. Because that reading was sustained judicially, see *Brooklyn Union Gas Co.* v. *State Human Rights Appeal Board*, 41 N.Y.2d 84 (1976),* the appellees have sought in the preemption clause of ERISA a means of inviting the federal courts to stop the Division from proceeding against them.

The impact of the decision below upon the Division cannot be measured, nor the Division's interest herein fully

* Although motions to reargue raised the question of preemption by ERISA, reargument was denied, the Attorney General taking no part. 42 N.Y.2d 824 (1977).

represented, by constitutional analysis alone. This Court should have before it, in addition, an explication of the Division's statutory interpretation and actual practice in conciliating or adjudicating cases within the rule in *Brooklyn Union Gas*. The Division is best able to reveal how its interpretation and practice comport with or intersect provisions in ERISA regulating employee welfare benefit plans. Only with that information can this Court measure ERISA's preemptive force in this context, identify the true preemptive targets, and conclude whether the declaratory and injunctive relief granted below was appropriate to the workings of the statutes and to limits on federal judicial power.

The Attorney General can be a party or attorney for a party before the Division, see Human Rights Law § 297.1, but his expertise does not extend to matters of custom and practice in settling or adjudicating complaints under the Human Rights Law. His representation of the Workers' Compensation Board and its Chair on the question whether ERISA preempts the Disability Benefits Law is plainly collateral to such matters and does not represent the Division's full interest in this appeal. The impact upon the Human Rights Law of the declaratory and injunctive relief granted and affirmed below can be assessed more thoughtfully and accurately if the Division's day-to-day first-hand experience with its own statute is considered together with the Attorney General's expertise.

Fully recognizing that divided arguments in this Court are not favored, see Rule 38.4, the Division submits that this request nevertheless comports with the rules of this Court, which afford oral argument and which further the

fullest possible presentation of issues this Court must decide.

This Court has accepted written and oral argument by counsel for agencies of the State of New York on questions of preemption. See, *e.g.*, *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767 (1947); *Railway Mail Assn.* v. *Corsi*, 326 U.S. 88 (1945).

At least to the extent the Division's brief states facts and arguments which may not have commended themselves to the Attorney General, the Division suggests that plenary consideration of all issues on this appeal will be served by divided argument.

For the foregoing reasons, it is respectfully requested that the Division be permitted to argue through its General Counsel, herself a party to this appeal, that the annexed brief and joint appendix be accepted for filing, that permission be granted to divide the argument in support of appellants, and that time be allotted equally to the Attorney General and to the Division.

Dated: New York, N.Y.
July 3, 1982

Respectfully submitted,

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Exhibit A

[LETTERHEAD OF]

STATE OF NEW YORK
DEPARTMENT OF LAW

June 18, 1982

Hon. Alexander L. Stevas, Clerk
United States Supreme Court
Washington, DC 20543

Re: Kramarsky v. Delta Air Lines, Inc., No. 81-1578

Dear Mr. Stevas:

As indicated in our Notice of Appearance and letter dated March 15, 1982, the Attorney General of New York represents all New York State agencies and officials who are appellants in this case.

We have been informed, however, that the appellant New York State Division of Human Rights and its officials intend to attempt to make a separate written and oral presentation to the Court on their own behalf. They do not, and could not reasonably, contend that there is any conflict among appellants or their counsel concerning their positions before this Court.

I wish to apprise you that the Attorney General has resolved this matter pursuant to his authority under New York Executive Law §63.1 as follows: This office will represent all appellants before the Court. The Attorney General will file one appendix and one brief and prepare one argument on behalf of all New York agencies and officials. No other state agency or official is authorized to file an appendix or briefs or to argue on behalf of any appellants.

If papers are filed or a request for argument is made by other counsel who purports to represent any appellants, the Attorney General requests that the papers not be accepted for filing, that opposing counsel be so informed and that the request for argument be denied.

Sincerely,

/s/ PETER BIENSTOCK

PETER BIENSTOCK
Attorney for Appellants

cc: All counsel

Appellee's Brief

1

Office - Supreme Court, U.S.
FILED
OCT 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1578

IN THE

Supreme Court of the United States

October Term, 1981

WERNER H. KRAMARSKY, Individually and in his capacity as Commissioner of the New York State Division of Human Rights; ANN THACHER ANDERSON, Individually and in her capacity as General Counsel of the New York State Division of Human Rights; the NEW YORK STATE DIVISION OF HUMAN RIGHTS, an agency of the Executive Department of the State of New York; WILLIAM B. KROEGER, Individually and in his capacity as Chairman of the New York State Workers' Compensation Board; and the NEW YORK STATE WORKERS' COMPENSATION BOARD,

Appellants,

against

DELTA AIR LINES, INC., U.S. AIR, INC., PIEDMONT AVIATION, INC., BRANIFF AIRWAYS, INC., REPUBLIC AIRLINES, INC., EASTERN AIR LINES, INC., NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., OZARK AIR LINES, INC., AMERICAN AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., and UNITED AIR LINES, INC.,

Appellees.

WERNER H. KRAMARSKY, As Commissioner of the New York State Division of Human Rights,

Appellant,

against

BURROUGHS CORPORATION,

Appellee.

WERNER H. KRAMARSKY, As Commissioner of the New York State Division of Human Rights, the NEW YORK STATE DIVISION OF HUMAN RIGHTS, and the NEW YORK STATE HUMAN RIGHTS APPEAL BOARD,

Appellants,

against

METROPOLITAN LIFE INSURANCE COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Second Circuit

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No. 81-1578

IN THE

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October Term, 1981

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WERNER H. KRAMARSKY, As Commissioner of the New York State Division of Human Rights,

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against

METROPOLITAN LIFE INSURANCE COMPANY,

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Questions Presented

1. Whether the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001-1461 ("ERISA") preempts the New York Human Rights Law, N.Y. EXEC. LAW §296.1 (McKinney 1972 & Supp. 1980-81), insofar as it purports to regulate employee benefit plans covered by ERISA?

2. Whether ERISA preempts the New York Disability Benefits Law, N.Y. WORK COMP. LAW §205.3 (McKinney 1965 & Supp. 1981-82), insofar as it purports to regulate employee benefit plans covered by ERISA?

Parties

The parties to the proceedings below are listed in the caption, except that (i) original plaintiff National Airlines, Inc. has been acquired by Appellee Pan American World Airways, Inc., (ii) Appellee U.S. Air, Inc. has been substituted for original plaintiff Allegheny Airlines, Inc. following a name change, (iii) Appellee Republic Airlines, Inc. has been substituted for original plaintiffs North Central Airlines, Inc. and Southern Airways, Inc. following their merger, and (iv) Appellant William B. Kroeger, the present Chairman of the New York Workers' Compensation Board, has been substituted as the successor in office to the original defendant Arthur Cooperman, pursuant to Fed. R. App. P. 43(c) and Sup. Ct. Rule 40.3.

TABLE OF CONTENTS

Page

Questions Presented i

Parties i

Table of Authorities iv

Statement of the Case 1

Statutory Background 2

1. Employee Retirement Income Security Act 2

2. Federal and State Laws Relating to Discrimination 3

The District Court's Decision 5

The Court of Appeals' Decision 6

Summary of Argument 8

Argument 10

I. The Court of Appeals Correctly Held that ERISA Preempts the New York Human Rights Law 10

A. The language and legislative history of section 514 12

B. *Alessi v. Rabestos-Manhattan, Inc* 16

C. Appellants' section 514(d) contentions 21

1. The effect of Title VII 22

2. Conflicting state regulations 25

3. The effect of the ADEA 27

II. The Court of Appeals Correctly Held that ERISA Preempts the New York Disability Benefits Law 30

A. Standard of Review 31

B. ERISA's effect on New York's Disability Benefits Law 32

1. The meaning of "maintained solely for the purpose of complying" 33

2. Appellants' contentions 36

Conclusion 40

TABLE OF AUTHORITIES

Cases: **Page**

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 501 (1981) ..... *passim*

Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board, 41 N.Y.2d 84, 390 N.Y.S.2d 884, 359 N.E.2d 393 (1976) 4

Chicago & N.W. Transportation Co. v. Kalo Brick & Title Co., 450 U.S. 311 (1981) 11

City of Chicago v. Atchison, Topeka & Santa Fe Ry. Co., 357 U.S. 77 (1958) 31

City of El Paso v. Simmons, 379 U.S. 497 (1965) 31

City of Los Angeles' Department of Water & Power v. Manhart, 435 U.S. 702 (1978) 26

City of New Orleans v. Dukes, 427 U.S. 297, 301 (per curiam) 31

Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942) 7,30

Conley v. Gibson, 355 U.S. 41 (1957) 31

Czosek v. O'Mara, 397 U.S. 25 (1970) 31

Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 11,19

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 3,18,20

Hamm v. Rock Hill, 379 U.S. 306 (1964) 19

Hines v. Davidowitz, 312 U.S. 52 (1941) 11

Kremer v. Chemical Construction Corp., 102 S. Ct. 1883 (1982) 24

Malone v. White Motor Corp., 435 U.S. 497 (1978) 17

Mandel v. Bradley, 432 U.S. 173 (1977) (per curium) 7

Minnesota Mining & Manufacturing Co. v. Minnesota, 444 U.S. 1041 (1980), *dismissing appeal from* 289 N.W.2d 396 (Minn. 1979) 7

Miree v. Dekalb County, 433 U.S. 25 (1977) 31

Mountain States Tel. & Tel. Co. v. Commissioner of Labor & Industry, 608 P.2d 1047 (Mont. 1979), *appeal dismissed* 445 U.S. 921 (1980) 7

Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) 27

Perez v. Campbell, 402 U.S. 637 (1971) 11

Pervel Industries, Inc. v. Connecticut Comm. on Human Rights, 603 F.2d 214 (2d Cir. 1979), *affirming* 468 F. Supp. 490 (D. Conn. 1978), *cert. denied*, 444 U.S. 1031 (1980) 6

Slaker v. O'Connor, 278 U.S. 188 (1929) 31

South Carolina Electric & Gas Co. v. Flemming, 351 U.S. 901 (1956) (per curiam) 31

Union Free School Dist. No. 6 v. New York State Human Rights Appeal Board, 35 N.Y.2d 371, N.Y.S.2d 139 (1974) 4

Wayne Chemicals, Inc. v. Columbus Agency Service Corp., 426 F. Supp. 316 (N.D. Ind. 1977) 13

Statutes:

Federal:

28 U.S.C. §1254(2) 30,31

Equal Pay Act, 29 U.S.C. §206(d) 2

Welfare and Pension Plans Disclosure Act of 1958, 29 U.S.C. §§301-309 (*repealed* eff. January 1, 1975 by §111(a)(1) of Employee Retirement Income Security Act of 1974, 29 U.S.C. §1031(a)(1)) 2,34

Age Discrimination in Employment Act, 29 U.S.C. §21 *et seq* 27-30

Section 4(f)(2), 29 U.S.C. §623(f)(2) 28-29

Section 14(a), 29 U.S.C. §633(a) 27,29

Section 14(b), 29 U.S.C. §633(b) 28

Age Discrimination in Employment Act Amendments of 1978, Pub.L. 95-256, 92 Stat. 189 (1978) 29

29 U.S.C. 653(b)(4) 21

Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001-1461 ..... *passim*

Section 2, 29 U.S.C. §1001 2,12

Section 2(a), 29 U.S.C. §1001(a) 34

Section 3(1), 29 U.S.C. §1002(1) 2,18

Section 3(2), 29 U.S.C. §1002(2) 18

Section 3(3), 29 U.S.C. §1002(3) 2,18

Section 4(1), 29 U.S.C. §1003(1) 37

Section 4(a), 29 U.S.C §1003(a) 2

Section 4(b)(3), 29 U.S.C. §1003(b)(3) 2,6,33,34

Section lll(a)(1), 29 U.S.C. §1031(a)(1) 34

Section 202(a)(2), 29 U.S.C. §1052(a)(2) 29

Section 203(a), 29 U.S.C. §1053(a) 16

Section 514(a), 29 U.S.C. §1144(a) ..... *passim*

Section 514(b), 29 U.S.C. §1144(b) 12,34

Section 514(c)(2), 29 U.S.C. §1144(c)(2) 12

Section 514(d), 29 U.S.C. §1144(d) ..... *passim*

Section 3022(4), 29 U.S.C. §1222(4) 15,38

40 U.S.C. §290 21

Pregnancy Disability Act, Pub.L. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. §2000e(k)) 5

Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e *et seq.* ..... *passim*

Section 703(a)(1), 42 U.S.C. §2000e-2(a)(1) 3,24

Section 706, 42 U.S.C. §2000e-5 23

Section 706(a), 42 U.S.C. §2000e-5(a) 24

Section 706(b)-(d), 42 U.S.C. §2000e-5(b)-(d) 22,23

Section 708, 42 U.S.C. §2000e-7 7,22,23

Railway Labor Act, 45 U.S.C. §151-188 (1976) 1

FED. R. CIV. P. 12(b)(6) 5,6,31

FED. R. CIV. P. 56 5

State:

CAL. UNEMP. INS. CODE §2070 *et seq.* (West 1972 & Supp. 1982) 28

CAL. UNEMP. INS. CODE §§2601-3272 (West 1972) 32

HAWAII STAT. §392-1 *et seq.* (1976 & Supp. 1981) 32

N.J. STAT. ANN. §§43:21-25 to 243:21-56 (West 1962) 32

N.J. STAT. ANN. §34:15-29 (West) 16

N.Y. EXEC. LAW §296.1 (McKinney 1972 & Supp. 1980-81).....1

N.Y. EXEC. LAW §296.1(a) (McKinney 1972 & Supp. 1980-81).....3

N.Y. EXEC. LAW §296.3 a(a) (McKinney 1972 & Supp. 1980-81).....28

N.Y. WORK. COMP. LAW §201 *et seq.* (McKinney 1965 Supp. 1981-82).....32

N.Y. WORK. COMP. LAW §201.9(B) (McKinney 1965 & Supp. 1972-78).....4

N.Y. WORK. COMP. LAW §204.2 (McKinney 1965 & Supp. 1981-82) 4,32

N.Y. WORK. COMP. LAW §205.1 (McKinney 1965 & Supp. 1981-82) 4,32

N.Y. WORK. COMP. LAW §205.3 (McKinney 1965) 3,32

N.Y. WORK. COMP. LAW §205.3 (McKinney 1965 & Supp. 1972-78) (*repealed* eff. June 29, 1981 by 1981 N.Y. Laws, ch. 352 §2).....3,4,32

N.Y. WORK. COMP. LAW §205.3 (McKinney 1965 & Supp. 1981-82).....1

R.I. GEN. LAWS §§28-39-1 to 28-41-33 (1979) 32

Regulations:

3 C.F.R. § 339 (1981) 2

29 C.F.R. § 860.120(a)(1981) 29

29 C.F.R. § 860.120(f)(iv)(A) (1981) 29

29 C.F.R. §860.120(f)(iv)(B)(1) (3) (1981) 29

46 Fed. Reg. 47,724 (1981) 28,29

Legislative History:

119 CONG. REC. 30409-10 (1973) 24

120 CONG. REC. 4726 (1974) 24

120 CONG. REC. 4742 (1974) 13

120 CONG. REC. 5002 (1974) 13

120 CONG. REC. 8218-19 (1978) 29

120 CONG. REC. 29197 (1974) 14

120 CONG. REC. 29933 (1974), *reprinted in* 1974 U.S. CODE CONG. & Ad. News 5177, 5188-89 ...14,25

120 CONG. REC. 29942 (1974) 13,15,25,27,38

124 CONG. REC. 7881 (1978) 29

124 CONG. REC. 8219 (1978) 30

124 CONG. REC. 54451 (1978) 21

H.R. REP. NO. 527, Part 1, 85th Cong., lst Sess. 9 (1977) 29

H.R. REP. NO. 533, 93rd Cong., lst Sess. 17, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4639, 4655 15,25

H.R. CONF. REP. NO. 1280, 93rd Cong., 2d Sess. 383, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5038, 5140 15,38

S. REP. NO. 493, 95th Cong., lst Sess. 13-16, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, 504, 516-19 28

S. Rep. No. 1440, 85th Cong., 2d Sess. 9-11, *reprinted in* 1958 U.S. CODE CONG. & AD. NEWS 4137, 4145-47 34

STATEMENT OF THE CASE

Appellees (hereinafter the "Airlines")* are thirteen interstate air carriers operating in the State of New York. As part of comprehensive fringe benefit programs established largely through collective bargaining agreements, the Airlines maintain various employee benefit plans subject to federal regulation under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001-1381 ("ERISA"). These plans include sick leave, disability and medical benefit programs through which payments are made to employees who suffer non-occupational illnesses or injuries. During the period relevant to this case, federal law did not require, and these plans did not provide, complete coverage for disabilities or costs associated with pregnancy.

Acting under authority of the New York Human Rights Law, N.Y. EXEC. LAW §296.1 (McKinney 1972 & Supp. 1980-81) ("HRL"), and Disability Benefits Law, N.Y. WORK. COMP. LAW §205.3 (McKinney 1965 & Supp. 1981-82) ("DBL"), Appellants attempted to require the Airlines to include complete pregnancy coverage in their employee benefit plans during the relevant period. The Airlines brought the present action seeking declaratory and injunctive relief against the application of the HRL and DBL to their benefit plans on the ground that each is preempted by ERISA.[1]

The issue presented by this appeal is whether the State of New York may directly, through the DBL, or indirectly, through the HRL, regulate the Airlines' ERISA covered employee benefit plans by dictating the contents of those plans, notwithstanding ERISA's plain language and legislative history to the contrary.

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*Pursuant to Sup. Ct. Rule 28.1, a listing of all parents, affiliates, and subsidiaries of the Airlines is set forth in the footnote appearing on page 1 of the Motion of Appellee Airlines to Affirm or Dismiss.

[1]The Airlines also contended that both statutes were preempted by the Railway Labor Act, 45 U.S.C. §§ 151-188 (1976), and conflicted with Title

Statutory Background

1. *The Employee Retirement Income Security Act*

Enacted in 1974, ERISA is a comprehensive federal statutory program designed to promote the stability of, and to curb a variety of abuses associated with, employee benefit plans. *See* 29 U.S.C. §1001 (statement of congressional purpose). To protect the integrity of the federal regulatory scheme and to eliminate the threat of conflicting and inconsistent state and local regulation, section 514(a) of ERISA, 29 U.S.C. §1144(a), provides that ERISA "shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. Section 4(a) extends ERISA coverage to "any employee benefit plan" maintained by an employer or union that affects interstate commerce. 29 U.S.C. §1003(a). The term "employee benefit plan" is defined broadly to encompass employee welfare plans and pension plans. 29 U.S.C. §1002(3). Employee welfare plans include, *inter alia*, "any plan, fund or program which is . . . established or maintained by an employer . . . for the purpose of providing . . . benefits in the event of sickness, accident, disability, death or unemployment." 29 U.S.C. §1002(1).

Section 4(b)(3) exempts from ERISA coverage benefit plans "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." 29 U.S.C. §1003(b)(3). In addition, section 514(d) provides that nothing in ERISA "shall be construed to alter, amend, modify, invalidate, impair or supercede any law of the United States." 29 U.S.C. §1144(d).

VII of the Civil Rights Act, 42 U.S.C. §200[illegible]e *et seq.*, the Equal Pay Act, 29 U.S.C. §206(d) and Exec. Order No. 11246, 3 C.F.R. 339, *reprinted in* 42 U.S.C. §2000e App. at 19-24. With respect to the HRL, these claims were not reached by the Court of Appeals and are not before this Court.

2. *Federal and state laws relating to discrimination*

Prior to January 1, 1975, the effective date of section 514 of ERISA, Title VII of the Civil Rights Act of 1964[2] and New York's HRL[3] both prohibited employment discrimination on the basis of sex. Neither statute expressly required employee benefit plans to provide benefits to employees absent from work as a result of pregnancy. During this same period, New York's Disability Benefits Law, which required employers to pay income maintenance benefits to employees disabled as a result of non-occupational illnesses and injuries, specifically excluded payments to employees absent from work because of pregnancy.[4] *See* N.Y. WORK. COMP. LAW §205.3 (McKinney 1965 & Supp 1972-78).

On December 2, 1976, this Court held that the mere exclusion of pregnancy benefits from coverage under disability benefit plans did not constitute sex discrimination within the meaning of Title VII. *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).[5] Less than three weeks later, however, the New York Court of Appeals held that section 296.1 of the HRL required private employers who maintain disability benefit plans to provide complete coverage for pregnancy, notwithstan-

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[2]42 U.S.C. §2000e-2 (a)(1). Among other things, §703(a)(1) of Title VII makes it unlawful for an employer to discriminate against an employee "because of . . . sex."

[3]Secton 296.1 of the HRL provides that it is an unlawful employment practice:

> (a) For an employer . . . because of the age, race, creed, color, national origin, sex or disability, or marital status of any individual . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

N.Y. EXEC. LAW §296.1(a) (McKinney 1972 & Supp. 1980-81).

[4]Until August 3, 1977, §205.3 of the DBL provided that no employee was entitled to benefits for disabilities "caused by or arising in connection with a pregnancy." N.Y. WORK. COMP. LAW §205.3 (McKinney 1965).

[5]This was the federal standard applicable to the Airlines' benefit plans at all times relevant to the present case.

ding the provisions of the DBL specifically excluding such benefits.[6] *See Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board*, 41 N.Y.2d 84, 390 N.Y.S.2d 884, 359 N.E.2d 393(1976). On July 11, 1977, the Airlines initiated the present action asserting, *inter alia*, that the application of the HRL to their employee benefit plans conflicted with the preemption provisions of ERISA (JA 1-22).[7]

On August 3, 1977, New York amended the DBL to eliminate the pregnancy exclusion and to require limited benefits for pregnancy related disabilities.[8] These amendments effectively overruled *Brooklyn Union Gas Co.* by providing that the DBL would be the sole statutory remedy for pregnancy benefit claims in the State of New York.[9] *See* N.Y. WORK. COMP. LAW §§201.9(B), 205.3 (McKinney 1965 & Supp. 1972-78). On December 30, 1977, the Airlines amended their Complaint to assert that the DBL was preempted by ERISA insofar as it required them to modify their employee benefit plans (JA 28-63).

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[6]The New York Court of Appeals had previously held that the HRL required pregnancy coverage in disability plans maintained by public employers who were not subject to the provisions of the DBL. *See Union Free School Dist. No. 6 v. New York State Human Rights Appeal Board*, 35 N.Y.2d 371, 362 N.Y.S.2d 139 (1974). *Brooklyn Union Gas Co.* "resolved" the conflict between the HRL and the DBL, both of which applied to private employers.

[7]Citations in the form "A_____" are to the Appendix to the Jurisdictional Statement and in the form "JA_____" to the Joint Appendix.

[8]1977 N.Y. Laws, ch. 675 §29, codified in N.Y. WORK. COMP. LAWS §205.3 (McKinney 1965 & Supp. 1972-78). These amendments required employers to provide a maximum of eight weeks coverage for pregnancy related disabilities. By contrast, employees suffering from other covered nonoccupational illnesses or injuries were entitled to 26 weeks of benefits during any one-year period. *See* N.Y. WORK. COMP. LAW §§204.2, 205.1 (McKinney 1965 & Supp. 1981-82). Effective June 29, 1981, §205.3 of the DBL was repealed. 1981 N.Y. Laws, ch. 352 §2.

[9]Although the 1977 amendments to the DBL effectively transferred jurisdiction over disability benefits for pregnancy from the New York Division of Human Rights to the Workers Compensation Board, Appellants Anderson and Kramarsky have never conceded that these amendments precluded application of the HRL to disability benefit plans with respect to pregnancy benefits.

The ongoing dispute between the Airlines and the State of New York concerning pregnancy benefits was effectively mooted when, in 1978, Title VII of the Civil Rights Act was amended, effective April 29, 1979, to require employers to provide pregnancy benefits on the same basis with all other disability benefits. See Pub. L. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. §2000e(k)).[10] Since the 1978 amendments to Title VII, the Airlines have provided benefits to pregnant workers in compliance with the requirements of federal law. What remained for decision in the courts below, and what remains for decision in this Court, is whether New York's HRL and DBL may be applied to the Airlines' employee benefit plans from the effective date of section 514 of ERISA (January 1, 1975), until the effective date of the pregnancy amendments to Title VII (April 29, 1979). Therefore, this Court must examine the facts and law as they existed during the period January 1, 1975 to April 29, 1979.

The District Court's Decision

The district court entered summary judgment in favor of the Airlines on their claim that the HRL was preempted by ERISA insofar as it relates to covered benefit plans,[11] and en-

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[10]Section 701 of Title VII now provides that:

> [W]omen affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

42 U.S.C. §2000e(k).

[11]Although the matter was before the district court on Appellants' motion to dismiss under FED. R. CIV. P. 12(b)(6) for failure to state a claim, the basic facts surrounding the coverage of the Airlines' employee benefit plans by ERISA and the applicability of ERISA's preemptive provisions to those plans under the district court's view of the applicable legal principles were not in dispute and it was agreed among counsel and the court that entry of final judgment under FED. R. CIV. P. 56 was appropriate with respect to the Airlines' claims concerning the HRL.

joined enforcement of the HRL with respect to the Airlines' employee benefit plans (A73-A76). Relying on the Second Circuit's decision in *Pervel Industries, Inc. v. Connecticut Commission on Human Rights*, 603 F.2d 214 (2d Cir. 1979), *affirming* 468 F. Supp. 490 (D. Conn. 1978), *cert. denied*, 444 U.S. 1031 (1980), which held that section 514 of ERISA preempted a similar Connecticut statute, the district court rejected Appellants' argument that since ERISA does not preempt federal laws, and Title VII "saves" state antidiscrimination laws from supercedure by Title VII, then ERISA must not preempt state antidiscrimination laws (A84-87).

As to the DBL, however, the district court granted Appellants' motion to dismiss under FED. R. CIV. P. 12(b)(6) for failure to state a claim upon which relief could be granted. Relying on section 4(b)(3), which excludes from ERISA coverage plans "maintained solely for the purpose of complying with applicable . . . disability insurance laws," 29 U.S.C. §1003(b)(3), the court reasoned that ERISA contemplates "independent and concurrent obligations" under federal and state law and held that "those *provisions* of an employee benefit plan which are maintained to comply with [state disability insurance] laws are excluded from ERISA" (A90)(emphasis added).

The Court of Appeals' Decision

Appellants sought review of that portion of the district court's order declaring the HRL preempted by ERISA in the United States Court of Appeals for the Second Circuit. The Airlines cross-appealed from that portion of the district court's order upholding the application of the DBL to their benefit plans.

The Second Circuit initially reversed the district court's order enjoining enforcement of the HRL (A39). Although the Second Circuit specifically rejected Appellants' argument that the HRL was protected from preemption by section 514(d), which preserves federal laws from supercedure by ERISA, it considered itself bound by this Court's summary dismissal,

for want of a substantial federal question, of an appeal from a state court decision holding that ERISA did not preempt a state fair employment law. *See Minnesota Mining & Manufacturing Co. v. Minnesota*, 444 U.S. 1041 (1980), *dismissing appeal from* 289 N.W.2d 396 (Minn. 1979).[12]

The Court of Appeals also vacated the district court's ruling that section 205.3 of the DBL was not preempted by ERISA. Following an exhaustive analysis of the language, legislative history and purpose of ERISA, the court held that by prescribing minimum plan benefits the DBL "relate[s] to" employee benefit plans within the meaning of section 514(a) of ERISA (A53-56). The court then considered Appellants' contention that if the Airlines were compelled to provide complete pregnancy coverage in their benefit plans, those portions of their plans dealing with pregnancy benefits would be "maintained solely for the purpose of complying with" the DBL and, therefore, exempt from ERISA coverage under section 4(b)(3).

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[12]The Second Circuit noted that in *Minnesota* the state court had relied on what has become known as the "double savings clause" argument in holding that ERISA did not preempt the state's fair employment law. Section 514(d) of ERISA, 29 U.S.C. §1144(d), exempts federal laws, including Title VII of the Civil Rights Act, from supercedure under §514(a). Title VII, in turn, exempts state fair employment laws from preemption by Title VII. *See* 42 U.S.C. §2000e-7. The double saving clause argument holds that the net effect of these two provisions is to exempt state antidiscrimination laws from preemption by ERISA. *See Minnesota*, *supra*; *Mountain States Tel. & Tel. Co. v. Commissioner of Labor & Industry*, 608 P.2d 1047 (Mont. 1979), *appeal dismissed* 445 U.S. 921 (1980).

In affirming the district court's decision in *Pervel*, *supra*, the Second Circuit had rejected this argument and it reiterated that rejection in the instant case as it was free to do since this Court's summary affirmance in *Minnesota* did not adopt the state court's reasoning in that case (A36 n.10). *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curium). This Court had previously rejected a "double savings clause" argument in *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942), when it held that a provision of the Internal Revenue Code disavowing any congressional intent that the Code provision itself preempted state regulation of the renovated butter business was irrelevant to the question whether other federal legislation regulating the manufacture of renovated butter preempted such state action. *Id.* at 162.

Rejecting the district court's interpretation of the term "plan" as referring to "isolated and subsidiary provisions of a plan," the court of Appeals held that "plan" as used in section 4(b)(3) refers to an integral unit or program, not to selected provisions (A56-65). Reasoning that if an employer provided disability benefits as part of a larger welfare scheme, comprising, for example, health insurance as well as disability benefits, his plan could not be maintained "solely" for the purpose of complying with any state disability insurance law, the Court of Appeals remanded the case of the district court to consider evidence of the nature of the Airlines' benefit plans (A65-66).

The Airlines petitioned the Second Circuit for reconsideration of that portion of its decision holding that the HRL was not preempted by ERISA in light of this Court's decision in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). Finding that the principles stated in *Alessi* were incompatible with the ruling in *Minnesota* that ERISA does not preempt state statutes regulating the nature of benefits an employer must provide in his employee benefit plans, the Court of Appeals vacated its prior decision and held that the HRL was preempted by ERISA insofar as it relates to the Airlines' employee benefit plans (A5-12).

SUMMARY OF ARGUMENT

1. *The Court of Appeals correctly held ERISA preempts the New York HRL.*

Section 514(a) of ERISA provides that ERISA "shall supercede any and all State laws insofar as they may now or hereafter relate [directly or indirectly] to any [covered] employee benefit plan." During the time relevant to the present case, federal law permitted the Airlines to choose whether or not to provide pregnancy benefits in their ERISA covered benefit plans. By requiring the Airlines to provide complete pregnancy benefits, the HRL prohibited a practice that was permitted by federal law and which Congress had chosen to leave to the discretion of plan designers and the economic forces

of the marketplace. Thus, the HRL plainly "relate[d] to" the Airlines' ERISA covered benefit plans within the meaning of section 514(a), and was preempted by that provision.

Section 514(d) of ERISA, which exempts federal laws, including Title VII of the Civil Rights Act of 1964, from supercedure by ERISA, does not alter this result. Although Title VII "saves" non-conflicting state laws from preemption by Title VII, it does not transform those laws into federal law. Since only federal laws are protected from preemption by ERISA, section 514(d) provides no basis for holding that the HRL has not been preempted.

2. *The Court of Appeals correctly held that ERISA preempts the New York Disability Benefits Law.*

As noted above, ERISA contemplates a federal occupation of the regulatory field that is very nearly total. Section 514(a) preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" described in section 4(a) and not exempt under section 4(b). The only state laws excluded from the operation of ERISA's preemption provisions are those regulating insurance, banking, or securities and generally applicable state criminal laws. New York's DBL does not fall within any of the categories of state laws protected from preemption and Appellants do not contend that it does. By prescribing specific plan benefits, the DBL plainly "relate[s] to" the Airlines' employee benefit plans within the meaning of section 514(a) and is preempted by that provision, unless the Airlines' plans are exempted from ERISA coverage by section 4(b).

Section 4(b)(3) of ERISA exempts from ERISA coverage employee benefit "plans" maintained "solely for the purpose of complying with applicable . . . disability insurance laws." Appellants argue that the pregnancy provisions of the DBL are "disability insurance laws" within the meaning of section 4(b)(3) and that the Airlines would not provide disability benefits to pregnant workers if they were not compelled to do so by the DBL. Thus, Appellants conclude that any portions

of the Airlines' benefit plans devoted to pregnancy benefits would be maintained "solely" to comply with the DBL. Appellants contend that these "portions" of the Airlines' plans would be exempt from regulation under ERISA by virtue of section 4(b)(3) and that the DBL would govern them notwithstanding section 514(a).

An examination of the language and purpose of ERISA, however, shows that the term "plan" as used in section 4(b)(3) refers to an integral unit or program, not to isolated and subsidiary provisions of a plan as Appellants urge. The plain terms of the statute refer to "plans," not to portions or provisions of a plan. Moreover, to permit the fragmentation of integrated benefit plans would disrupt the uniformity that Congress sought to achieve through section 514(a) by allowing a state to remove specific disability provisions of a complex benefit plan from coverage under ERISA by merely legislating on a particular subject.

Employee benefit plans, such as the Airlines', that are arrived at largely as a result of collective bargaining and exceed the requirements of the DBL by including sick pay, health care and other benefits that the State of New York could not permissibly require under section 4(b)(3), are not maintained solely for the purpose of complying with the DBL, but are the result of the employer's need to attract and retain qualified personnel. Since the Airlines' benefit plans are clearly not maintained "solely" for the purpose of complying with the DBL, section 4(b)(3) provides no basis for holding that the application of the DBL to the Airlines' benefit plans has not been preempted by ERISA.

ARGUMENT

I. The Court Of Appeals Correctly Held That ERISA Preempts The New York HRL

When Congress has chosen to legislate pursuant to its constitutional powers, local laws are necessarily preempted

whenever they stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Perez v. Campbell*, 402 U.S. 637, 649 (1971), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Determining the preemptive effects of federal legislation, in the absence of an express congressional statement on the subject, involves "a two-step process of first ascertaining the construction of the [federal and state] statutes and then determining the constitutional question whether they are in conflict." *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981), quoting *Perez v. Campbell*, *supra*, at 644. The second and more difficult step requires an examination of the nature of the regulated subject matter to ascertain whether it permits of dual regulation, as well as declarations of congressional design to displace state regulation. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). A holding of federal preemption of state law, however, is inescapable and requires no inquiry into these often complex and difficult questions when, as in the present case, Congress has unambiguously stated its intention to exclude state regulation.

Section 514(a) of ERISA provides that ERISA "shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. §1144(a). Therefore, the only issue presented by this appeal with respect to New York's HRL is whether it is a "State law" that "relate[s] to" the Airlines' ERISA covered "employee benefit plans." If the answer is yes, then the constitutional question of preemption is answered without further analysis.

New York's HRL plainly "relate[s] to" the Airlines' ERISA covered benefit plans within the meaning of section 514(a), and is preempted by that provision, insofar as it purports to require those plans to include benefits not provided by their terms. By requiring the Airlines to include complete pregnancy coverage in their benefit plans, the HRL prohibited a practice that was permitted by federal law and which Congress had chosen to leave to the discretion of plan designers and the economic forces of the marketplace.

While the language of section 514(a) is alone sufficient to dispose of this case, an examination of the extensive legislative history of section 514, this Court's recent decision in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, and Appellants' arguments demonstrates beyond any doubt that the holding of the Court of Appeals that ERISA preempts the HRL is correct and should be affirmed.

A. *The language and legislative history of section 514*

ERISA is a comprehensive and integrated federal legislative program designed to protect interstate commerce, the federal taxing power and the interests of participants in employee benefit plans covered by the Act. *See* 29 U.S.C. §1001 (statement of congressional purpose). Although ERISA does not mandate uniform plan benefits, it does contemplate that plans, once negotiated, will be uniformly administered, free of state law variations, except in certain specified areas not applicable here.

To protect the integrity of the federal regulatory scheme and to eliminate the threat of conflicting and inconsistent state regulation, section 514 of ERISA sets forth a detailed statement of ERISA's preemptive effects. Section 514(a) provides that ERISA "shall supercede any and all State laws *insofar as they may now or hereafter relate to* any employee benefit plan" covered by ERISA. 29 U.S.C. §1144(a) (emphasis added). Section 514(c)(2) defines "State" to include "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, *directly or indirectly*, the terms and conditions of employee benefit plans covered by this subchapter." 29 U.S.C. §1144(c)(2) (emphasis added). Section 514(b) exempts state insurance, banking, securities and generally applicable criminal laws from the preemptive effects of section 514(a).[13] *See* 29 U.S.C. §1144(b). Finally, section 514(d)

[13]New York's Human Rights Law does not fall within one of the categories of state laws protected from preemption by §514(b) and Appellants do not contend otherwise.

provides that ERISA does not supercede other federal laws. 29 U.S.C. §1144(d).

The legislative history of ERISA shows that Congress intended the scope of section 514(a) to be fully as broad as its language suggests. Both the House and Senate Conference Committees rejected versions of section 514(a) which would have limited preemption to areas of specific conflict between state and federal law. Thus, an early House version would have superceded state laws only "insofar as they may now or hereafter relate to the reporting and disclosure responsibilities, and fiduciary responsibilities, of persons acting on behalf of any employee benefit plan," 120 CONG. REC. 4742 (1974), while an early Senate version would have superceded state laws only "insofar as they may now or hereafter relate to the subject matters regulated by this Act," 120 CONG. REC. 5002 (1974). Instead of adopting one of these narrow provisions, Congress opted for broad preemption language. According to Senator Jacob Javits of New York, the ranking minority member of the Senate Committee on Labor and Public Welfare, this action was taken to avoid the possibility of:

> [E]ndless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.

120 CONG. REC. 29942 (1974).[14]

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[14]"Senator Javits' point is clear. The courts are to be relieved of the difficult task of deciding whether a particular state law governing some aspect of employee benefit plans may be enforced concurrently with federal law. Rather, the preemption question is to be resolved by simply determining whether the plan in question is covered by ERISA. *Wayne Chemicals, Inc. v. Columbus Agency Service Corp.*, 426 F. Supp. 316, 321 (N.D. Ind. 1977).

The sponsors of the bill in both the House and Senate clearly expressed Congress' intent to absolutely preempt the field of employee benefit plan regulation. In introducing the Conference Report on ERISA, Senator Harrison Williams, the Senate sponsor, stated:

> It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. *This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.*

120 CONG. REC. 29933 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5177, 5188-89 (emphasis added). Similarly, Congressman John Dent, the House sponsor, stated that the "crowning achievement" of ERISA was its reservation to the federal government of the sole power to regulate the field of employee benefit plans:

> The conferees, with the narrow exceptions specifically enumerated, applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans. Thus, the provisions of section 514 would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof--including any professional society or association operating under color of law--which would affect any employee benefit plan as described in section 4(a) and not exempt under section 4(b).

120 CONG. REC. 29197 (1974).

According to Senator Javits, preemption of the field was

intended to provide for uniform regulation of employee benefit plans:

> Although the desirability of further regulation--at either the State or Federal level--undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required--but for certain exceptions--the displacement of State action in the field of private employee benefit programs.

120 CONG. REC. 29942 (1974). The House Committee on Education and Labor also emphasized that it was essential for ERISA to provide a uniform source of law in the area of benefit plan regulation. *See* H.R. REP. NO. 533, 93d Cong., 1st Sess. 17, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4639, 4655.

In adopting a regime of broad preemption, Congress was well aware that many aspects of employee benefit plans would be left to the discretion of plan designers and the economic forces of the marketplace and collective bargaining table. As Senator Javits noted:

> The conferees--recognizing the dimensions of such a policy--also agreed to assign the Congressional Pension Task Force the responsibility of studying and evaluating preemption in connection with State authorities and reporting its findings to the Congress. If it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modifications can be made.

120 CONG. REC. 29942 (1974); *see also* 29 U.S.C. §1222(4); H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 383, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5038, 5140 (Joint Pen-

sion Task Force to study "effects and desirability" of ERISA preemption policy).

The legislative history of ERISA reveals both that Congress carefully considered the question of preemption, including the feasibility of enacting a more limited preemption provision, and ultimately enacted section 514 with the express purpose of summarily preempting state regulation of ERISA covered benefit plans. That the statute, standing alone or buttressed by its legislative history, was intended to supercede the application of state laws, such as New York's HRL, to the Airlines' ERISA covered benefit plans is indisputable.[15]

B. *Alessi v. Raybestos-Manhattan, Inc.*

This Court's decision last term in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, also strongly supports a finding of preemption in the present case. In *Alessi*, the plaintiffs challenged the validity of certain "integration" provisions in their employers' pension plans which reduced a retiree's pension benefits by the amount of workers' compensation payments received after retirement. The plaintiffs argued that these provisions were prohibited by section 203(a) of ERISA[16] and by a 1977 New Jersey statute which prohibited reductions of pension benefits based on workers' compensation awards.[17]

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[15]Appellants' contention that the EEOC's contrary views, as expressed in its amicus briefs in the lower courts, are entitled to "significant weight" hardly alters this conclusion. *See* Brief of Appellants at note 38 and accompanying text. In the first place, administrative interpretations can only be accorded "weight" when they express the views of the agency responsible for enforcing the statute being construed and ERISA is the responsibility of the Secretary of Labor—not the EEOC. Moreover, the United States, setting forth the views of the Secretary of Labor, has appeared in *this* Court in support of affirmance.

[16]29 U.S.C. §1053(a). Section 203(a) prohibits forfeiture of vested pension rights, with specified exceptions that do not include workers' compensation off-sets.

[17]N.J. STAT. ANN. §34:15-29 (West).

After district court rulings that the New Jersey statute invalidated the plans and was not superceded by ERISA, the Court of Appeals for the Third Circuit reversed, concluding that since the state statute imposed an additional requirement for pension plans, it was preempted by section 514(a) of ERISA.

This Court, after plenary consideration, agreed with the Court of Appeals that ERISA preempted the New Jersey statute. Recognizing that preemption of state law by federal law is not lightly inferred, the Court found that section 514(a) of ERISA expressed a congressional intent to preempt the field of benefit plan regulation:

> In this instance, we are assisted by an explicit congressional statement about the pre-emptive effect of its action. The same chapter of ERISA that defines the scope of federal protection of employee pension benefits provides that
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> > "the provisions of this Subchapter . . . shall supercede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in §1003(a) of this title and not exempt under 1003(b) of this title." 29 U.S.C. §1144(a).
>
> This provision demonstrates that Congress intended to depart from its previous legislation that "envisioned the exercise of state regulation over pension funds," *Malone v. White Motor Corp.*, 435 U.S. 497, 512, 514 (1978) (plurality opinion), and *meant to establish pension plan regulation as exclusively a federal concern.*

451 U.S. at 522-23 (footnote omitted) (emphasis added).

The Court then turned to the question whether the New Jersey statute, which did not purport to regulate pension plans

qua pension plans, was a "State law" that "relate[d] to any employee benefit plan" within the meaning of section 514(a). Having ruled in an earlier section of its opinion that ERISA, despite its silence on the subject, did not forbid the practice of integrating pension benefits with workers' compensation awards, the Court found that the New Jersey statute did "relate to" such plans, even though it did so indirectly:

> Whatever the purpose or purposes of the New Jersey statute, we conclude that it "relate[s] to pension plans" governed by ERISA because it *eliminates* one method for calculating pension benefits—integration —that is *permitted* by federal law . . . .
>
> It is of no moment that New Jersey intrudes indirectly, through a workers' compensation law rather than directly, through a statute called "pension regulation." *ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern.*

Id. at 524-25 (emphasis added).

Although this Court's decision in *Alessi* did not purport to determine the outer limits of ERISA's preemptive reach, the principles established in that case amply cover the present situation. The employee benefit plans at issue here are covered by ERISA.[18] During the time relevant to this case, federal law permitted the Airlines to choose whether or not to provide coverage for pregnancy in their benefit plans.[19] By requiring

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[18]The fact that *Alessi* dealt with pension benefit plans, rather than with welfare benefit plans, such as those at issue in the present case, is of no moment. Section 514(a) applies to all employee benefit plans, which are defined to include both "pension" and "welfare" benefit plans. *See* 29 U.S.C. §§1002(1), 1002(2), 1002(3).

[19]*See General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

the Airlines to provide complete pregnancy coverage, New York's HRL applied directly to matters which federal law then reserved to private choice and eliminated one permissible method for allocating the cost of pregnancy related disabilities. Thus, the HRL plainly "relate[d] to" the Airlines' ERISA covered benefit plans within the meaning of section 514(a), and was preempted by that provision.

Appellants' attempts to distinguish *Alessi* are unpersuasive. Appellants first argue that *Alessi* involved a "direct substantive conflict" between ERISA and New Jersey's workers' compensation statute.[20] A direct substantive conflict between a state statute and federal law, however, only exists where the state statute requires the doing of an act that is prohibited by federal law or prohibits the doing of an act that is required by federal law. *See e.g.*, *Hamm v. Rock Hill*, 379 U.S. 306, 311 (1964); *Florida Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). The New Jersey statute in *Alessi* prohibited a practice that was merely permitted, not required, by federal law. Hence, contrary to Appellants' assertions, *Alessi* did not involve a direct substantive conflict between state and federal law.[21] Although the Court did perceive a "direct clash" between the New Jersey statute and the federal policy embodied in section 514 of ERISA to establish regulation of employee benefit plans as an exclusive federal concern, 451 U.S. at 523 n.20, this same clash exists between ERISA and the HRL insofar as the latter purports to regulate employee benefit plans covered by ERISA.

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[20]*See* Brief of Appellants at 34-35; *see also* Brief of Amici ACLU at 11-13; Brief of Amici AFL-CIO at 11 n.4, 12; Brief of Amici States at 13.

[21]The illogic inherent in Appellants' argument can be illustrated by applying their definition of a "direct substantive conflict" to New York's HRL and Title VII of the Civil Rights Act. The HRL prohibits employment discrimination based on "marital status," "disability" and "other grounds" not prohibited and, therefore, permitted by Title VII. Hence, applying Appellants' definition, it follows that there must be a "direct substantive conflict" between the HRL and Title VII. Since Title VII itself supercedes conflicting state laws, under Appellants' definition of a direct conflict, the HRL would be preempted by Title VII.

Appellants also attempt to distinguish *Alessi* on the ground that the statutes at issue here and in *Alessi* are not identical. Contrary to Appellants' assertions, however, there is no rational basis for distinguishing between the New Jersey statute in *Alessi* and New York's HRL so as to reach a different result on the preemption issue. The HRL, like the New Jersey workers' compensation statute, "relate[s] to" employee benefit plans governed by ERISA insofar as it purports to *require* covered plans to include benefits not provided for by the terms of those plans. During the period relevant to the present case, federal law did not require the Airlines' benefit plans to provide benefits for pregnant workers, *General Electric Co. v. Gilbert*, 429 U.S. 125, just as federal law did not require plans covered by ERISA to integrate pension benefits and workers' compensation awards. Hence, the HRL, like the New Jersey statute in *Alessi*, prohibited a practice that was permitted by applicable federal law and which Congress had chosen to leave to the discretion of plan designers.

Appellants finally argue that this Court's opinion in *Alessi* is not relevant to the present case because it was limited to an analysis of section 514(a) and did not address Appellants' contention that since Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, "preserves" state fair employment laws from supersedure by Title VII, and integrates certain state enforcement procedures, preemption of New York's HRL by ERISA would "alter, modify or impair" Title VII in contravention of section 514(d). This argument, however, ignores the fact that the same theory urged by Appellants in the present case could have been applied in *Alessi* to preclude a finding of preemption.

Numerous federal statutes integrate or preserve state workers' compensation laws. For example, section 4(b) of the Occupational Safety and Health Act of 1980 ("OSHA") provides that:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or af-

> fect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

29 U.S.C. §653(b)(4). Since ERISA does not preempt OSHA and section 4(b) of that Act expressly preserves state workers' compensation laws, applying Appellants' argument, it necessarily follows that ERISA does not preempt state workers' compensation laws even to the extent that those laws relate to employee benefit plans covered by ERISA.[22] Implicit in this Court's ruling in *Alessi*, however, is the notion that preemption of state laws under section 514(a) is to be determined without regard to section 514(d) or the fact that other federal laws do not themselves preempt state laws. *See* 451 U.S. at 526 n.22; *see also* 124 CONG. REC. 54451 (1978)(comments of Senator Javits).

C. *Appellants' section 514(d) contentions*

Appellants do not dispute that the Airlines' employee benefit plans are covered by ERISA, or that the HRL is a "State law" that "relate[s] to" employee benefit plans within the meaning of section 514(a); rather they contend that, despite the plain language and legislative history of ERISA, Congress did not intend to preempt state regulation of ERISA covered

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[22]Federal law also integrates state workers' compensation laws with respect to public lands and buildings. *See* 40 U.S.C. 290. Unlike OSHA and Title VII, however, §290 of Title 40 expressly incorporates the substantive provisions of state workers' compensation laws and vests in the several states the authority to enforce those laws on all lands and premises owned or held by the United States. Again, applying Appellants' theory, since §290 incorporates state workers' compensation laws, to hold, as this Court did in *Alessi*, that New Jersey's workers' compensation statute is preempted by §514(a) of ERISA, would necessarily "alter, amend, modify, invalidate, impair or supersede a law of the United States" in contravention of §514(d).

benefit plans under state antidiscrimination laws.[23] In support of their position, Appellants point to section 514(d) of ERISA, which provides:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supercede *any law of the United States* (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

29 U.S.C. §1144(d) (emphasis added). Appellants then note that Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, "saves" state fair employment laws from preemption by Title VII,[24] and integrates certain state enforcement procedures.[25] According to Appellants, these provisions of Title VII operate to integrate "state fair employment laws" and procedures into the federal fair employment scheme under Title VII.[26] Concluding that the substantive provisions of state antidiscrimination laws are thereby "incorporated" into Title VII,[27] Appellants argue that supercedure of any state antidiscrimination law under section 514(a) of ERISA would alter, modify or impair the "substance" of Title VII in contravention of section 514(d). Appellants' theory is incorrect for a number of reasons and was properly rejected by the courts below.

1. *The effect of Title VII*

The fundamental flaw in Appellants' argument is that it assumes that the substantive provisions of nonconflicting state

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[23]See Brief of Appellants at 23-33.

[24]Brief of Appellants at 21; *see* 42 U.S.C. §2000-7.

[25]Brief of Appellants at 22; *see* 42 U.S.C. §2000-5(b)-(d).

[26]Brief of Appellants at 22-25.

[27]*Id.* at 25, 31; *see also* Brief of Amici States at 6-8; Brief of Amici AFL-CIO at 4-9; Brief of Amici ACLU at 19-21.

antidiscrimination laws[28] are incorporated into Title VII. Although Title VII "saves" non-conflicting state laws from preemption by Title VII, it does not transform those laws into federal law. Title VII did not create new authority for state antidiscrimination laws; it simply left them where they were before the enactment of Title VII.

The fact, argued so stridently by Appellants and their amici, that state antidiscrimination laws may be more "protective" than Title VII, is simply a function of the police powers residing in the states. Contrary to Appellants' assertions, Title VII did not "supplement [the] states' traditional police power,"[29] but simply left it intact to the extent its exercise did not create a conflict with Title VII. No new powers were vested in the states by Title VII and certainly no power was given to the states to create provisions of federal law.

Appellants' reliance on the integration of state enforcement procedures in section 706 of Title VII, 42 U.S.C. §2000e-5, is similarly misplaced. Although section 706 provides for deferral of charges alleging violations of Title VII to certain state agencies,[31] the provisions of this section only apply in states with laws that prohibit "the unlawful employment practice alleged."[32] Since Title VII's procedures and remedies are on-

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[28]It is significant that while Appellants read §708 of Title VII as preserving only state antidiscrimination laws, the language of that provision is much broader. Section 708 not only saves from preemption state antidiscrimination laws, but *all* state laws of any kind which impose a liability, duty, penalty or punishment. *See* 42 U.S.C. §2000e-7. Thus, it could be argued, with the same force as Appellants urge the non-preemption of the HRL, that §708 when read in conjunction with §514(d) of ERISA, saves all state laws, including those directly regulating employee benefit plans. The result, of course, would be to read §514(a) of ERISA out of the statute.

[29]Brief of Appellants at 27.

[30]*See* 42 U.S.C. §2000e-5(b)-(d).

[31]*Id.*

[32]For example, a charge of discrimination on the basis of marital status or sexual orientation would not trigger the section 706 procedures, and deferral would not be involved, even in states which outlaw discrimination in employment on these grounds. Similarly, deferral is not involved in states whose laws do not prohibit the practices prohibited by Title VII. *See* 42 U.S.C. §2000e-5(b)-(d).

ly available to persons alleging violations of the substantive provisions of Title VII, integration of state and federal enforcement procedures presupposes that the employment practice complained of constitutes a substantive violation of Title VII. Where, as in the present case, the practice complained of did not constitute a violation of Title VII, the procedural integration between Title VII and state antidiscrimination laws is not involved.[13]

Similarly, the requirement that the EEOC accord substantial weight to the findings of state agencies in determining questions of reasonable cause applies only in states whose antidiscrimination laws overlap with the substantive provisions of Title VII. *See* 42 U.S.C. §2000e-5(a). Moreover, this requirement relates only to factual determinations, not to conclusions of law concerning the substantive provisions of Title VII. There is nothing in the statutory language or legislative history of Title VII suggesting that the states are free to decide what is and is not a violation of Title VII. If, however, state proceedings result in factual findings that are determinative of whether a Title VII violation exists, there would rarely be any purpose served by second guessing those findings.[14]

In sum, the substance of Title VII is not altered by the application of section 514(a) of ERISA to New York's HRL any

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[13]Appellants also stress the concern expressed in Congress during enactment of ERISA that plan benefits be made available on a non-discriminatory basis. In both the Senate and the House, antidiscrimination amendments were withheld upon assurances of floor leaders of the legislation that plans covered by ERISA would be covered by §703(a) of Title VII, 42 U.S.C. §2000e-2(a). 120 CONG. REC. 4726 (1974); 119 CONG. REC. 30409-10 (1973). But nowhere in the floor debates was any concern expressed, or assurance given, that *state* antidiscrimination laws would apply to plans covered by ERISA. In fact, the colloquy in both chambers pointed in exactly the opposite direction.

[14]This was the principle involved in this Court's recent decision in *Kremer v. Chemical Construction Corp.*, 102 S. Ct. 1883 (1982), which held that collateral estoppel and res judicata rules may be applied to factual findings of state courts with respect to discrimination claims during later civil actions under Title VII.

more than the enactment, repeal or amendment of any state antidiscrimination law would alter the substance of Title VII. If a practice relating to employee benefit plans was illegal under Title VII, it remained illegal after the enactment of ERISA and section 514(a) merely preempted state laws which might prohibit the same practice. If a practice was permitted by Title VII, as in the present case, preemption of state laws purporting to prohibit that same practice affected Title VII to the same degree—not at all. Otherwise, the illogical result in this case would be that an employment practice permitted by Title VII during the relevant period would also be prohibited by Title VII during that same period.

2. *Conflicting state regulations*

As the plain language and legislative history of section 514(a) clearly indicate, Congress did not intend to leave broad areas of employee benefit plan regulation open for state action. Preemption of the field was intended to provide uniform regulation of employee benefit plans by eliminating the threat of conflicting or inconsistent state regulation. *See* 120 CONG. REC. 29933 (1974) (comments of Senator Williams); 120 CONG. REC. 29942 (1974) (comments of Senator Javits), *see also* H.R. REP. NO. 533, 93d Cong., 1st Sess. 17, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4629, 4655. Acceptance of Appellants' argument, however, would disrupt the uniformity that Congress sought to achieve through section 514, allowing the states to broadly regulate ERISA covered benefit plans under the rubric of state antidiscrimination laws. The plans of nationwide employers, such as the Airlines, would be subject to all of the requirements of New York's HRL, and subject to further, and possibly conflicting, requirements imposed by the antidiscrimination laws of other states.[35]

[35]Acceptance of Appellants' argument would also render meaningless the express exemption from ERISA's preemptive effects of state insurance, banking, securities and generally applicable criminal laws, since other federal statutes already "preserve" such state laws. *See e.g.*, Federal Reserve Act, 12 U.S.C. §330 (state banking laws); Bank Holding Company Act of 1956,

Even in those areas where the substantive provisions of Title VII and state antidiscrimination laws appear to be coextensive, the threat of conflicting and inconsistent state regulation of employee benefit plans is apparent. For example, absent preemption under section 514(a), there would be nothing to prevent a state from declaring that a ten year vesting requirement for pension plan participation operates as an impediment to job opportunities or fair compensation for "underrepresented" minority workers. Similarly, a state could declare that employer contributions for equal face value life insurance coverage for male and female employees discriminates against female workers, because coverage for male workers is more costly and thus generates more expensive and discriminatory contributions on behalf of male workers. Questions such as these are complex and may lead reasonable people to disagree as to the proper approach to preserve fair treatment for all. *Cf. City of Los Angeles' Department of Water & Power v. Manhart*, 435 U.S. 702 (1978). That different rules could be promulgated in different states on these and other issues cannot be seriously disputed. The legislative history of ERISA, however, makes it clear that such questions are to be resolved, if at all, on a nationwide basis with respect to employee benefit plans.

Appellants, however, argue that section 514(d) of ERISA not only protects from preemption state laws providing the same protections as Title VII, but *all* state antidiscrimination laws. Thus, Appellants and their amici not only cite pregnancy discrimination, but discrimination on the basis of marital status,[36] disability,[37] age,[38] parenthood,[39] sexual orientation,[40]

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12 U.S.C. §1846 (state banking laws); Securities Act of 1933, 15 U.S.C. §77r (state securities laws); Securities Exchange Act of 1934, 15 U.S.C. §78bb(a) (state securities laws); McCarren Ferguson Act, 15 U.S.C. §1012(b) (state insurance laws).

[36]Brief of Appellants at 28; Brief of Amici States at 16.

[37]Brief of Appellants at 28; Brief of Amici States at 15.

[38]Brief of Appellants at 8; Brief of Amici States at 11.

[39]Brief of Amici States at 16.

[40]*Id.* at 16.

and "other grounds"[41] as appropriate areas for state regulation of employee benefit plans. If Appellants' argument is accepted, the chaos that would result in the administration of plans of nationwide employers, such as the Airlines, could only be imagined, and the federal interest in "uniformity with respect to interstate plans"[42] could never be realized.

3. *The effect of the ADEA*

The threat of conflicting and inconsistent state and federal regulation is perhaps best illustrated in the area of age discrimination. Although Appellants scrupulously avoid any discussion of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 *et seq.*, amici States and amici ACLU discuss the ADEA at length.[43] As amici States correctly note, the ADEA, like Title VII, preserves non-conflicting state laws[44] and establishes a joint federal-state enforcement mechanism that is nearly identical to the enforcement scheme adopted in Title VII.[45] *See Oscar Mayer & Co. v. Evans*, 441

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[41] Brief of Appellants at 28.

[42] 120 CONG. REC. 29942 (1974) (comments of Senator Javits).

[43] *See* Brief of Amici ACLU at 30-34; Brief of Amici States at 9-12.

[44] Section 14(a) of the ADEA provides that:

> (a) Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of an action under this Act such action shall supersede any State action.

29 U.S.C. §633(a)

[45] Section 14(b) of the ADEA provides that:

> (b) In the case of an alleged unlawful practice occuring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice no

U.S. 750 (1979). Like Title VII, when the ADEA was enacted Congress expressly acknowledged that the states would retain their power to act in the area of age discrimination in employment.[46] Accordingly, states are free to pass their own age discrimination laws. Most states have done so, and in many instances their provisions differ substantially from the ADEA.[47]

As amici States correctly point out,[48] there is no principled distinction between Title VII and the ADEA insofar as the application of section 514(a) of ERISA is concerned. Hence, if Appellants' argument is accepted, employee benefit plans covered by ERISA would be required to comply with all state age discrimination laws, absent a direct conflict with the ADEA. Such a conclusion, however, would almost inevitably result in conflicting or inconsistent state and federal regulation of employee benefit plans. For example, the ADEA and ERISA presently permit employers to cease contributions to defined benefit and defined contribution plans for employees who continue working beyond the plan's normal retirement age (typically age 65).[49] This is so notwithstanding the 1978

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suit may be brought under Section 7 of this Act before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated. . . .

29 U.S.C. §633(b).

[46]See S. REP. No. 493, 95th Cong., 11th Sess. 13-16, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 504, 516-19.

[47]For example, while the ADEA covers employees between the ages of 40 and 70, New York's HRL applies to workers between the ages of 18 and 65, N.Y. EXEC. LAW §296.3-a(a) (McKinney 1982), and California's age discrimination law has no age ceiling at all, CAL. UNEMP. INS. CODE. §2070 *et seq.* (West 1972 & Supp. 1982).

[48]Brief of Amici States at 9-14 (arguing that both age and sex discrimination are appropriate areas for state regulation of ERISA covered benefit plans). *But see* Brief of Amici ACLU at 30-34 (arguing that sex discrimination, but not age discrimination, is an appropriate area for state regulation of ERISA covered benefit plans).

[49]See 29 U.S.C. §623(f)(2); *see also* 46 Fed. Reg. 47,724 (1981) (to be

Amendments to the ADEA, which increased the permissible mandatory retirement age from 65 to 70.[50] Similarly, both ERISA and the ADEA permit defined benefit plans to exclude employees hired less than five years prior to the plan's normal retirement age.[51] These federal statutes have also been interpreted as allowing employers to reduce welfare benefit levels for older workers to the extent necessary to achieve approximate equivalency in contributions for older and younger workers.[52] That state age discrimination laws, such as New York's HRL, could be interpreted to prohibit these very same practices, on the ground that they result in different treatment of covered workers on account of their age, is apparent.[53] Since the ADEA expressly preserves state age discrimination laws, whether these laws can properly regulate employee benefit plans covered by ERISA is simply a question of whether they are preempted by section 514(a), or are somehow saved from preemption by section 514(d) under Appellants' theory.

The notion that state antidiscrimination laws are entitled to a special implied exception to preemption under section 514(a) by virtue of section 514(d), however, was discussed and expressly rejected by Senators Javits and Williams, the Senate sponsors of ERISA, during debates on the 1978 Amendments to the ADEA:

> Mr. Javits. Finally, Mr. President, it is understood that just as these age discrimination amendments do

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codified in 29 C.F.R. §1625.10); 29 C.F.R. §860.120(f)(iv)(B)(1)-(3) (1981).

[50]*See* Age Discrimination in Employment Act Amendments, Pub. L. 95-256, 92 Stat. 189(1978).

[51]*See* 29 U.S.C. §1052(a)(2); 29 U.S.C. §623(f)(2); *see also* 46 Fed. Reg. 47,724(1981)(to be codified in 29 C.F.R. §1625.10); 29 C.F.R. §860.120(f)(iv)(A)(1981).

[52]Fed. Reg. 47,724 (1981) (to be codified in 29 C.F.R. §1625.109); 29 C.F.R. §860.120(a) (1981); *see also* 120 CONG. REC. 8218-19 (1978) (comments of Senators Javits and Williams); 124 CONG. REC. 7881 (1978) (comments of Rep. Hawkins); H.R. REP. NO. 527, Part 1, 95th Cong., 1st Sess. 9 (1977).

[53]*See* 29 U.S.C. §633(a).

> not interfere with ERISA, State age discrimination in employment laws are not to interfere with ERISA . . . . [T]he preemption rules of section 514(a) of ERISA shall be determinative regarding the preemption of State age discrimination laws which directly or indirectly establish requirements relating to employee benefit plans. *ERISA's preemption of State age discrimination laws shall be determined without regard to section 514 (d) of ERISA or the fact that the ADEA does not itself preempt State law.*
>
> Mr. Williams. I concur in my friend's observations as they accurately state the controlling principles of law in this regard.

124 CONG. REC. 8219 (1978) (emphasis added). This explicit acknowledgement by the Senate architects of ERISA that state age discrimination laws are not protected from preemption by section 514(d) succintly refutes Appellants' entire theory. ERISA's preemption of state antidiscrimination laws, such as New York's HRL, is to be determined without regard to section 514(d) or the fact that other federal laws, such as Title VII, do not themselves preempt state law. *See Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942).

II. The Court Of Appeals Correctly Held That ERISA Preempts The New York Disability Benefits Law.

Appellants have also appealed to this Court, pursuant to 28 U.S.C. §1254(2), from that portion of the Court of Appeals' decision reversing the district court's dismissal of the Airlines' claim that ERISA preempts the New York Disability Benefits Law.[14] The Airlines' claim was before the lower

[14]Although Appellants have not addressed the issue, there are serious questions concerning the jurisdiction of this Court over that portion of Appellants' appeal relating to the Airlines' claim that ERISA preempts applica-

courts on Appellants' motion to dismiss under FED. R. CIV. P. 12(b)(6) for failure to state a claim upon which relief could be granted. No evidence was offered or received in the district court and the sole question presented by this portion of the appeal is whether the allegations of the Airlines' Amended Complaint are sufficient to state a claim that the application of the DBL to the Airlines' benefit plans is preempted by ERISA."

A. *Standard of review*

As this Court has repeatedly observed, a motion to dismiss for failure to state a claim should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *accord*, *Czosek v. O'Mara*, 397 U.S. 25 (1970). For purposes of ruling on Appellants' motion, the material allegations of the Airlines' Amended Complaint must be accepted as true, *Miree v. Dekalb County*, 433 U.S. 25, 27 n.2 (1977), and any factual allegations in Appellants' motion or supporting papers must be disregarded. Judged by these standards, the allegations of the Airlines' Amended Complaint concerning the preemption of New York's DBL insofar as it applies to the Airlines' ERISA

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tion of the DBL to their employee benefit plans. The ruling of the Court of Appeals reversing the district court's dismissal of the Airlines' claim under FED. R. CIV. P. 12(b)(6) is not a final judgment, which appears to be a requirement before this Court may entertain an appeal under 28 U.S.C. §1254(2). *See Slaker v. O'Connor*, 278 U.S. 188, 189 (1929); *South Carolina Electric & Gas Co. v. Flemming*, 351 U.S. 901 (1956) (per curiam). Although the continuing vitality of the finality requirement in the context of §1254(2) has been questioned, it has never been expressly abandoned. *See City of New Orleans v. Dukes*, 427 U.S. 297, 301 (per curiam); *City of El Paso v. Simmons*, 379 U.S. 497, 501-03 (1965); *City of Chicago v. Atchison, Topeka & Santa Fe Ry. Co.*, 357 U.S. 77, 82-83 (1958).

"Those portions of the Amended Complaint relating to the Airlines' claim that ERISA preempts application of the DBL to their employee benefit plans are reproduced in the Joint Appendix at JA50-52.

covered employee benefit plans clearly state a claim upon which relief can be granted and the Court of Appeals' holding to that effect should be affirmed.

B. *ERISA's effect on New York's Disability Benefits Law*

New York is one of only five states that require employers to provide benefits to workers disabled as a result of non-occupational illnesses or injuries.[56] *See* N.Y. WORK. COMP. LAW §201 *et seq.* (McKinney 1965 & Supp. 1981-82). Prior to August 3, 1977, however, an employee in the State of New York had no right to disability benefits for pregnancy under New York's Disability Benefits Law because that statute specifically excluded such benefits.[57] On that date, New York amended the DBL to require employers to provide a minimum of eight weeks coverage for employees absent from work due to normal pregnancy.[58]

Unlike New York's Human Rights Law, the DBL does not merely prohibit employers from "discriminating" against employees absent from work due to pregnancy, but affirmatively requires employers to provide specific pregnancy benefits.[59] By prescribing specific plan benefits, the DBL plainly "relate[s] to" the Airlines' employee benefit plans within the meaning

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[56]California, Hawaii, New Jersey and Rhode Island have also enacted disability insurance laws. *See* CAL. UNEMP. INS. CODE 2601-3272 (West 1972); HAWAII STAT. §392-1 *et seq.* (1976 & Supp. 1981); N.J. STAT. ANN. §§43:21-25 to 43:21-56 (West 1962); R.I. GEN. LAWS §§28-39-1 to 28-41-33 (1979).

[57]Prior to August 3, 1977, §205.3 of the DBL provided that no employee was entitled to benefits for disabilities "caused by or arising in connection with a pregnancy." N.Y. WORK. COMP. LAW §205.3 (McKinney 1965).

[58]See 1977 N.Y. Laws, ch. 675 §29, codified in N.Y. WORK. COMP. LAWS §205.3 (McKinney 1965 & Supp. 1972-78). Effective June 29, 1981, §205.3 of the DBL was repealed. 1981 N.Y. Laws, ch. 352 §2.

[59]See N.Y. WORK. COMP. LAW §§204.2, 205.1 (McKinney 1965 & Supp. 1981-82).

of section 514(a) of ERISA, and is preempted by that provision.

Appellants do not dispute that the Airlines' benefit plans are as a whole covered by ERISA or that the DBL is a "State law" that "relate[s] to" the Airlines' benefit plans within the meaning of section 514(a); rather they contend that the DBL is insulated from preemption by section 4(b)(3) of ERISA. Section 4(b)(3) *exempts from ERISA coverage* "plans" that are "maintained solely for the purpose of complying with applicable . . . disability insurance laws." 29 U.S.C. §1003(b)(3). Appellants argue that the pregnancy provisions of the DBL are "disability insurance laws" within the meaning of section 4(b)(3) and that the Airlines would not provide disability benefits to pregnant workers if they were not compelled to do so by the DBL. Thus, Appellants conclude that any *portions* of the Airlines' benefit plans devoted to pregnancy benefits would be maintained "solely for the purpose of complying" with the DBL. Reasoning that ERISA contemplates "independent and concurrent obligations" under state and federal law, Appellants urge that these "portions" of the Airlines' plans would be exempt from regulation under ERISA by virtue of section 4(b)(3) and that the DBL would continue to govern them notwithstanding section 514(a). It is respectfully submitted that Appellants' somewhat creative reading of section 4(b)(3) is unsupported by either the language or purpose of ERISA and was properly rejected by the court below.

1. *The meaning of "maintained solely for the purpose of complying"*

As discussed above, ERISA contemplates a federal occupation of the regulatory field that is very nearly total. Section 514(a) preempts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" described in section 4(a) and not exempt under section 4(b). 29 U.S.C. §1144(a). The only state laws excluded from the operation of ERISA's preemption provisions are those regulating insurance, banking or securities and generally ap-

plicable state criminal laws. *See* 29 U.S.C. §1144(b). New York's DBL does not fall within any of the categories of state laws protected from preemption and Appellants do not contend that it does. Thus, the DBL is clearly preempted by federal law insofar as it relates to the Airlines' employee benefit plans, unless the Airlines' *plans* are exempted from ERISA coverage by section 4(b).

Section 4(b)(3) of ERISA, which is incorporated by reference in section 514, exempts from ERISA coverage employee benefit "plans" maintained "*solely* for the purpose of complying with applicable . . . disability insurance laws." 29 U.S.C. §1003(b)(3) (emphasis added).[40] The focus of section 4(b)(3) is on the *purpose* for which *plans* are maintained and not on *state laws*. State laws are only preempted "insofar as they . . . relate to" employee benefit plans which are not exempted from ERISA coverage by section 4(b).

The term "solely" means to the exclusion of alternative or competing purposes or duties. Thus, whether a plan is covered by ERISA and immune from state regulation involves a straightforward factual inquiry. Is the plan maintained solely

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[40]The language of section 4(b)(3) of ERISA is taken almost verbatim from language which was first used by Congress in §4(b)(2) of the Welfare and Pension Plans Disclosure Act of 1958, 29 U.S.C. §§301-309 (the "WPPDA") (*repealed* eff. January 1, 1975 by §111(a)(1) of ERISA, 29 U.S.C. §1031(a)(1)). The WPPDA was enacted in response to the tremendous increase in the number of private employee benefit plans following World War II and the concomitent increase in their mismanagement. See S. REP. NO. 1440, 85th Cong., 2d Sess. 9-11, *reprinted in* 1958 U.S. CODE CONG. & AD. NEWS 4137, 4145-47. The inclusion of the term "solely" in §4(b)(2) assured that those employee benefit plans which were the object of the WPPDA's disclosure and reporting requirements were not inadvertently exempted because such plans were also subject to state disability insurance or workmen's compensation laws.

Although ERISA goes far beyond the disclosure requirements of the WPPDA, it nevertheless was clearly intended to safeguard employee benefit plans from the same abuses which led to the passage of the WPPDA. *See* 29 U.S.C. §1001(a). Therefore, §4(b)(3) of ERISA, like its predecessor, should be construed narrowly to achieve ERISA's objectives and the term "solely" should be interpreted literally.

for the purpose of complying with a state disability insurance law? If a plan is maintained for other purposes, it is subject to federal regulation under ERISA and is shielded from state regulation by the preemptive effects of section 514(a). If a plan is maintained solely for the purpose of complying with a state disability insurance law, then it is not covered by ERISA at all and is open to state regulation.

Plans which exceed the requirements of state law and more broadly serve employee needs as a result of collective bargaining or the employer's need to attract and retain qualified employees are not maintained "solely" for the purpose of complying with state disability insurance laws. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 523 n.20. Since the Airlines' benefit plans are arrived at largely as a result of collective bargaining and exceed the requirements of the DBL by including sick pay, health care and other benefits that the State of New York could not permissibly require under section 4(b)(3), it is clear that they are not maintained solely for the purpose of complying with the DBL. Moreover, the Airlines employ only a fraction of their total work force in New York, yet provide disability coverage to all of their employees, regardless of where they are employed. Since only four states other than New York have enacted any sort of disability insurance law, many of the Airlines' employees are receiving disability coverage that is not required by any state law. The plans providing coverage to these employees are therefore not being maintained solely for the purpose of complying with any state disability insurance law[61]

In any event, the Airlines have alleged, and are entitled to a factual presumption, that their employee benefit plans are not maintained solely for the purpose of complying with New York's DBL. Since facts obviously could exist which would

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[61]It cannot be doubted that there are numerous employee benefit plans in New York that *are* maintained solely for the purpose of complying with the DBL, and therefore exempt from ERISA regulation. Such plans, however, are usually maintained by small, intrastate employers and are easily identified by reference to the considerations listed in the preceding discussion.

permit the Airlines to show that their employee benefit plans are not being maintained "solely" for the purpose of complying with the DBL, the district court clearly erred in dismissing the Airlines' preemption claim and the Court of Appeals' decision reversing and remanding the case for appropriate factual inquiry should be affirmed.

2. *Appellants' contentions*

Appellants' principal argument involves a subtle distortion of the interrelationship between sections 4(b)(3) and 514 of ERISA. In section 4(b)(3) Appellants find a congressional "toleration" of state disability insurance laws. This toleration is then transported to section 514 and engrafted along with state insurance, banking, securities and generally applicable criminal laws to the preemption exceptions expressly contained in section 514(b). Under this approach the focus is no longer upon the characteristics of particular *plans*, but is instead upon the labels placed on state *statutes*. Under Appellants' theory, an ERISA covered benefit plan is subject to both state and federal regulation with regard to disability benefits available to employees—a result totally at odds with obvious congressional intent.

An argument similar to that urged by Appellants was expressly addressed and rejected by this Court in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504. The plaintiffs in *Alessi* argued that if the benefit plans under consideration in that case had been maintained solely to comply with New Jersey's workers' compensation law, the plans would be exempt from ERISA's coverage, and that if plans maintained solely to comply with a certain law are not covered by ERISA, that law should not be deemed preempted. The Court rejected this reasoning on the basis of the "plain language" of section 514(a), stating:

> The only relevant state laws, or portions thereof, that survive this preemption provision are those relating to plans that are themselves exempted from

> ERISA's scope. And the relevant exemption from ERISA coverage for plans maintained *solely* for compliance with state workers' compensation laws has no bearing on the plans involved here, which more broadly serve employee needs as a result of collective bargaining.

Id. at 523 n.20 (emphasis in original).

In an apparent recognition of the weakness of their principal theory, Appellants offer an alternative argument. Those "portions" of a plan that provide disability benefits, such as the specific pregnancy provisions that Appellants seek to impose on the Airlines, are to be separated out and considered a wholly separate plan which is somehow deemed to be maintained "solely for the purpose of complying" with the DBL. Under Appellants' theory this new "plan" may be modified at the will of the state while the remaining portions of the employee benefit plan are deemed to be a separate "plan" not subject to state regulation. Although this rationale for upholding the application of New York's DBL to the Airlines' ERISA covered benefit plans is suggested by the district court's opinion, it is no more supported by the language or purpose of ERISA than Appellants' principal argument.

An examination of the language and purpose of ERISA shows that the term "plan" as used in section 4(b)(3) refers to an integral unit or program, not to isolated and subsidiary provisions of a plan as Appellants urge. The plain terms of the statute refer to "plans," not to portions or provisions of a plan. *See* 29 U.S.C. § 1003(1). Moreover, to permit the fragmentation of integrated benefit plans would disrupt the uniformity that Congress sought to achieve through section 514(a) by allowing a state to remove specific disability provisions of a complex benefit plan from coverage under ERISA by merely legislating on a particular subject. For nationwide employers, such as the Airlines, those provisions might be subject to New York's DBL, yet also subject to the requirements of ERISA in states without "applicable . . . disability insurance laws," and subject to further, and possibly conflic-

ting, requirements imposed by other states with such laws. Congress clearly did not intend to permit such successive layers of regulation to be imposed on portions of a plan otherwise subject in its entirety to ERISA alone.

In a final effort to support their position, Appellants suggest that if the Airlines' preemption claims are upheld, workers in the State of New York will be left without disability coverage. The preemption provisions of ERISA, however, have been in effect since January 1, 1975, and the upheavals and disfunctions warned of by Appellants have not occurred. The reason is simple. The Airlines and other employers who maintain employee benefit plans covered by ERISA must compete for qualified workers in the State of New York and elsewhere. In order to effectively compete, the Airlines must provide fringe benefit packages, including welfare benefit plans, which are substantial enough to attract and hold qualified employees.

When Congress enacted ERISA in 1974, it was well aware that many aspects of employee benefit plans would be left to the discretion of plan designers and the economic forces of the marketplace and collective bargaining table. Recognizing the breadth of the preemption policy adopted in ERISA, the Congressional Pension Task Force was assigned the responsibility of studying and evaluating the effects of ERISA's preemption provisions and reporting its findings to Congress.[62] During the debates on ERISA, Senator Javitts of New York stressed that if *Congress* determined that the preemption policy adopted in ERISA had the effect of precluding essential legislation at either the state or federal level, "appropriate modifications" could be made. *See* 120 CONG. REC. 29942 (1974). Thus, Congress was fully aware of the effects of its action and acknowledged in advance that adjustments in the scope of

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[62]See 29 U.S.C. §1222(4); H.R. CONF. REP. NO. 1280, 93rd Cong., 2d Sess. 383, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5038, 5140 (Joint Pension Task Force to study "effects and desirability" of ERISA preemption policy).

ERISA's preemptive provisions could be made by *Congress* if later shown to be needed.

Contrary to Appellants' assertions, it is not the function of this Court to second guess the policy decisions of the legislature. That ERISA, standing alone or supported by its legislative history, was intended to preempt the application of state laws, such as New York's DBL, to the Airlines' ERISA covered benefit plans is indisputable. Where, as here, congressional intent is clear, it should be given effect.

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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Appellee's Brief

2

No. 81-1578

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In The

Supreme Court of the United States

October Term, 1981

WERNER H. KRAMARSKY, As Commissioner of the New York State Division of Human Rights,

Appellant,

against

BURROUGHS CORPORATION,

Appellee.

On Appeal from the United States Court of Appeals for the Second Circuit

BRIEF FOR APPELLEE

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Question Presented

Whether the Employee Retirement Income Security Act of 1974 ("ERISA") preempted the New York State Human Rights Law insofar as it purported to regulate ERISA covered employee benefit plans.

Parties

The parties to the proceedings below are listed in the caption.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties	i
Table of Authorities	iv
Statement of the Case	2
Statutory Background	3
The District Court's Decision	5
The Court of Appeals' Decisions	5
Summary of Argument	7
Argument	8
The Court of Appeals correctly held that the Employee Retirement Income Security Act of 1974 preempted the New York State Human Rights Law	8
Conclusion	8

TABLE OF AUTHORITIES

Cases	Page
Alessi v. Raybestos-Manhattan Inc., 451 U.S. 504	6
Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board, 41 N.Y.2d 84, 359 N.E.2d 393, 390 N.Y.S.2d 884	4
General Electric Co. v. Gilbert, 429 U.S. 125	4
Minnesota Mining & Manufacturing Co. v. Minnesota, 444 U.S. 1041, dismissing appeal, 289 N.W.2d 396	5, 6
Pervel Industries, Inc. v. State of Connecticut Commission on Human Rights & Opportunities, 603 F.2d 214, aff'g 468 F. Supp. 490, cert. denied, 444 U.S. 1031	5
Statutes:	
Civil Rights Act of 1871, 42 U.S.C. 1983	6
Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.*	4
42 U.S.C. 2000e-2(a)(1)	4
42 U.S.C. 20003(k)	4
Employee Retirement Income Security Act of 1974, Title I, 29 U.S.C. 1001 *et seq.*	*passim*
Section 3(3), 29 U.S.C. 1002(3)	3
Section 3(1), 29 U.S.C. 1002(1)	3
Section 514(a), 29 U.S.C. 1144(a)	3, 5, 7
Section 514(c)(1), 29 U.S.C. 1144(c)(1)	3
Section 514(d), 29 U.S.C. 1144(d)	3, 4, 7
N.Y. Exec. Law §296.1(a) (McKinney Supp. 1972-1981)	2, 4, 5, 6, 7

In The

Supreme Court of the United States

October Term, 1981

No. 81-1578

WERNER H. KRAMARSKY, As Commissioner of the New York State Division of Human Rights,

Appellant,

against

BURROUGHS CORPORATION,

Appellee.

On Appeal from the United States Court of Appeals for the Second Circuit

BRIEF FOR APPELLEE

Statement of the Case

Subsequent to January 1, 1975, Burroughs Corporation ("Burroughs")[1] maintained a nationwide employee benefit plan subject to federal regulation under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001 *et seq.* ("ERISA") (A109, JA134).[2] The plan was designed to compensate Burroughs' employees for certain non-employment related disabilities, which did not include pregnancy (JA134).

Pursuant to Section 296.1(a) of the Executive Law of New York ("Human Rights Law"), the New York State Division of Human Rights ("Division") attempted to require that Burroughs' plan include pregnancy-related disability benefits for its New York State employees, even though such benefits were not required under federal law (A109-A110, JA136). In response, Burroughs commenced this action seeking to enjoin the Division from prosecuting Burroughs for its refusal to compensate its New York State employees for pregnancy-related disability benefits (JA131, JA137-JA138). In addition, Burroughs requested a declaration of its rights and obligations under its plan regarding pregnancy-related disabilities (JA131, JA138).

The issue presented by this appeal is whether the Division through the Human Rights Law, could regulate Burroughs' ERISA covered employee benefit plan, despite ERISA's clear language and legislative history to the contrary.

1Pursuant to Supreme Court Rule 28.1, a listing of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Burroughs is set forth on page 11 of Burroughs' Motion to Affirm.

2Citations in the form "A__" are to the Appendix to the Jurisdictional Statement and in the form "JA__" to the Joint Appendix.

Statutory Background

1. *The Employee Retirement Income Security Act of 1974.*

In 1974, Congress concluded that employee benefit plans significantly affected interstate commerce as well as the well-being and security of millions of employees. Congress further concluded that because efforts at benefit regulation by states had been inconsistent and inadequate, Congress should fully occupy the field.

Accordingly, Congress passed ERISA and included a pre-emption mandate broadly designed to eliminate, effective January 1, 1975, the danger of inconsistent state regulation. In that regard, Congress provided in Section 514(a) of ERISA that except for specified state laws not relevant to this case, ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. §1144(a).

The term "State law" was defined to include all state "laws, decisions, rules, regulations, or other State action having the effect of laws. . . ." 29 U.S.C. Section 1144(c)(1). Further, the term "employee benefit plan" was defined to include employee welfare plans. 29 U.S.C. §1002(3). An "employee welfare plan" was defined to include "any plan, fund, or program . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment. . . ." 29 U.S.C. §1002(1). Finally, Section 514(d) of ERISA provided that nothing in ERISA "shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States. . . ." 29 U.S.C. §1144(d).

2. *Title VII of the Civil Rights Act of 1964:*

Beginning in 1965, Title VII of the Civil Rights Act of 1964 ("Title VII") prohibited, among other things, discrimination in employment on the basis of sex. 42 U.S.C. 2000e-2(a)(1). On December 2, 1976, this Court held that Title VII's prohibition against sex discrimination did not require employers to provide disability benefits for pregnancy under employee benefit plans. *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976).

Thus, Burroughs was not required by federal law to provide pregnancy-related disability benefits under its employee benefit plan to any of its nationwide employees until April 29, 1979, when Title VII was amended to require employers to treat pregnancy-related disabilities the same as other disabilities. *See* Pub.L. 95-955, 92 Stat. 2076 (1978) (Codified at 42 U.S.C. §20003(k)).

3. *New York State Law*

Commencing in 1965, the Human Rights Law also prohibited discrimination in employment on the basis of sex. N.Y. Exec. Law §296.1(a) (McKinney 1972 & Supp. 1980-81). On December 20, 1976, the New York State Court of Appeals held that private employers were required by Section 296.1(a)'s prohibition against sex discrimination to provide, under their employee benefit plans, pregnancy-related disability benefits to their New York State employees. *Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board,* 41 N.Y.2d 84 (1976).

Because Burroughs complied with the 1979 amendment to Title VII, the only issue before this Court is whether the Division could use the Human Rights Law to regulate Burroughs' ERISA covered employee benefit plan between January 1, 1975 and April 29, 1979.

District Court's Decision

Relying upon *Pervel Industries, Inc. v. Connecticut Commission on Human Rights*, 603 F.2d 214 (Cir. 1979), affirming 468 F. Supp. 490 (D.C. Conn. 1978), cert. denied, 444 U.S. 1031 (1980), the District Court concluded that Section 514(a) of ERISA preempted the Human Rights Law to the extent it related to Burroughs' employee benefit plan and that Title VII did not save the Human Rights Law from preemption by ERISA (A107-A117). Thus, the District Court granted Burroughs' application for a preliminary injunction enjoining the Division from prosecuting Burroughs for its refusal to compensate New York State employees for pregnancy-related disability benefit claims arising between January 1, 1975 and April 29, 1979 (A116-A117).

Thereafter, the Division and Burroughs stipulated that under the findings of fact and conclusions of law contained in the District Court's decision of November 14, 1979, Burroughs was entitled to a permanent injunction and a declaratory judgment that under the terms of ERISA, it had no obligation to pay disability benefits to its employees for any pregnancy-related disabilities arising between January 1, 1975, and April 29, 1979 (A105-A106). The terms of the stipulation were approved by the District Court and final judgment was entered (A116-A117).

The Court of Appeal's Decisions

The Division appealed the District Court's judgment to the United States Court of Appeals for the Second Circuit. The Second Circuit initially concluded that it was bound by this Court's summary dismissal, for want of a substantial federal question, of an appeal from a state court decision holding that ERISA did not preempt a similar state fair employment law (A67-A69). *See Minnesota Mining & Manufacturing Co. v. Minnesota*, 444 U.S. 1041 (1980), dismissing appeal from 289

N.W. 2d 396 (Minn. 1979). The Second Circuit, therefore, reversed the injunction and declaratory judgment of the District Court (A69).[3]

In light of this Court's decision in *Alessi v. Raybestos-Manhattan Inc.*, 451 U.S. 504 (1981), however, Burroughs petitioned the Second Circuit for reconsideration of its decision that the Human Rights Law was not preempted by ERISA (JA154). Concluding that the analysis in *Alessi*, decided shortly after its initial decision in this case, of congressional intention to occupy totally the employee benefits field was inconsistent with the result in *Minnesota*, the Second Circuit examined the merits of the ERISA preemption issue. In so doing, the Second Circuit concluded that ERISA preempted state regulation of the nature of employee benefit plans. The Second Circuit, therefore, vacated its original decision and affirmed the District Court's judgment. (A13-A14).[4]

3Since the District Court had not ruled on Burroughs' claim under 42 U.S.C. §1983 that Burroughs had been denied its constitutional rights under color of state law, the Second Circuit remanded for whatever further consideration Burroughs might seek on such claim.

4Again, the Second Circuit remanded Burroughs' Section 1983 claim for such further consideration as might be appropriate.

Summary of Argument

The Court of Appeals correctly held that ERISA preempted the Human Rights Law. The clear language and legislative history of ERISA demonstrates Congress' intent to exclude the states from regulation of ERISA covered employee benefit plans. After specifically rejecting more limited preemption proposals, Congress elected to broadly preempt any and all state laws insofar as they related to any ERISA covered employee benefit plan. From this broad preemption mandate, Congress chose only to carve out exemptions for specific state laws not relevant to this case. With this approach, Congress sought to regulate employee benefit plans exclusively under uniform federal law. Because the Division attempted to use the Human Rights Law to interfere with such uniformity by requiring Burroughs to provide benefits other than those required by federal law, the Human Rights Law was preempted by Section 514(a) of ERISA between January 1, 1975 and April 29, 1979.

This result is unaffected by Section 514(d) of ERISA, which saves federal laws from alteration, modification, impairment or supersedure by ERISA. Merely because Title VII does not preempt inconsistent state laws, the Human Rights Law does not become mystically reborn as a federal law. It remains a state law, which, although not preempted by Title VII, is preempted by ERISA. Nor is there any alteration, modification or impairment of Title VII when, as here, ERISA preempts a state law which prohibits an act permitted by Title VII.

ARGUMENT

The Court of Appeals correctly held that ERISA preempted the New York State Human Rights Law.

Burroughs hereby adopts the Argument on this point presented in the brief on the merits submitted by Appellees Delta Airlines, Inc. *el al.*, which has been assigned the same United States Supreme Court Docket No. as Burroughs, No. 81-1578.

CONCLUSION

For the foregoing reasons, the decision of the Second Circuit upon rehearing should be affirmed.

Dated: October 14, 1982

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Appellee's Brief

3

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No. 81-1578

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

WERNER H. KRAMARSKY, et al.,

Appellants,

—v.—

DELTA AIR LINES, INC., et al.,

Appellees.

WERNER H. KRAMARSKY,

Appellant,

—v.—

BURROUGHS CORPORATION,

Appellee.

WERNER H. KRAMARSKY, et al.,

Appellants,

—v.—

METROPOLITAN LIFE INSURANCE COMPANY,

Appellee.

BRIEF OF APPELLEE METROPOLITAN LIFE INSURANCE COMPANY

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Question Presented

Does the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001-1461 ("ERISA"), preempt the New York Human Rights Law ("HRL") insofar as it purports to regulate employee benefit plans covered by ERISA?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

ARGUMENT 3

CONCLUSION 4

TABLE OF AUTHORITIES

Cases:

Alessi v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) 3

Pervel Industries, Inc. v. *Connecticut Commission on Human Rights and Opportunities*, 468 F.Supp. 490 (D. Conn. 1978), *aff'd*, 603 F.2d 214 (2d Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980) 2

Statutes:

Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 ..... i, 1

New York Executive Law Article 15 (McKinney 1972 & Supp. 1981-1982) (Human Rights Law) ..... i, 1, 2, 3

Statement of the Case

Appellee Metropolitan Life Insurance Company ("Metropolitan")* commenced this action in the United States District Court, Southern District of New York, on February 13, 1980 seeking declaratory and injunctive relief prohibiting appellants Werner H. Kramarsky, as Commissioner of the New York State Division of Human Rights ("Commissioner"), the New York State Division of Human Rights ("State Division") and the New York State Human Rights Appeal Board ("Appeal Board") from further prosecuting, adjudicating and/or enforcing any orders with respect to complaints filed by four employees of Metropolitan. The employees had alleged discrimination under the HRL in connection with payment of disability or other benefits for pregnancy or pregnancy-related conditions under Metropolitan's employee benefit plans.

Metropolitan maintains various plans or programs providing benefits to its employees, including plans maintained for the purpose of providing employees with medical, surgical, or hospital care or benefits, and benefits in the event of sickness or disability. Such plans, including Metropolitan's medical expense and disability benefits plans are "employee benefit plan[s]" within the meaning of ERISA, 29 U.S.C. §§1002(1) and (3), and accordingly, are covered by and subject to regulation by that federal statute. See 29 U.S.C. §1003.

The four employees who had filed complaints with the State Division sought disability benefits on the ground that they had become disabled due to pregnancy or pregnancy-related conditions. Each complaint charged Metropolitan with a discriminatory practice under the HRL because it failed to provide benefits comparable to those provided for conditions unrelated to pregnancy. Metropolitan claimed before the State Division that it lacked the authority to proceed by reason of ERISA's preemp-

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*Pursuant to Sup. Ct. Rule 28.1, a listing of all parents, affiliates and subsidiaries of Metropolitan is set forth at page 3 of Metropolitan's Motion to Dismiss or Affirm.

tion provisions. The State Division, however, proceeded to adjudicate the complaints.

In each proceeding the State Division found probable cause to believe that Metropolitan had engaged in a discriminatory practice in violation of the HRL. Hearings were held in two of the four proceedings resulting in orders entered by the State Division requiring Metropolitan to provide disability benefits. In one order, entered January 17, 1980, the hearing examiner ordered Metropolitan to cease and desist from further "discriminatory" practices and to identify all other employees who had been similarly "discriminated" against and to pay them what they would have received if pregnancy-related disability were treated the same as conditions unrelated to pregnancy under Metropolitan's employee benefit plans. That order was referred to the Commissioner for his review.

On the same day that Metropolitan filed its complaint in the district court, it moved, by order to show cause, for a preliminary injunction enjoining the Commissioner, the State Division and the Appeal Board from further prosecuting the proceedings brought by Metropolitan's employees. Judge Whitman Knapp heard argument on February 13 and 14, 1980 and, finding it unnecessary to sign the order to show cause, issued an oral decision on February 14, 1980 holding that under controlling authority in the Second Circuit, *Pervel Industries, Inc.* v. *Connecticut Commission on Human Rights and Opportunities*, 468 F. Supp. 490 (D. Conn. 1978), *aff'd*, 603 F.2d 214 (2d Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980), ERISA preempted the HRL insofar as it required the employee benefit plans of Metropolitan to provide certain benefits to the four employees who had brought proceedings before the State Division. Accordingly, the district court granted Metropolitan's motion for a preliminary injunction and ordered that, pending a final determination of the action, the Commissioner, the State Division and the Appeal Board were enjoined from further prosecuting the proceedings, enforcing any orders, or adjudicating any issues

with respect to the complaints filed with the State Division by those employees

Appellants appealed to the Second Circuit. The appeal was consolidated with the appeals in *Delta Air Lines, Inc.* v. *Kramarsky* ("*Delta*") and *Burroughs Corp* v. *Kramarsky* ("*Burroughs*") and all three were decided together. Initially, the Second Circuit reversed the district court's order in this case, 650 F.2d 1309, on the basis of its opinion in *Delta*, 650 F.2d 1287, in which it held that, under controlling precedent of this Court, the HRL was not preempted by ERISA. After that determination, this Court decided *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). In light of *Alessi*, Metropolitan and the appellees in *Delta* and *Burroughs* moved in the Second Circuit for reargument and reconsideration. On reconsideration, the Second Circuit, relying on *Alessi*, vacated its prior decisions in this case, 666 F.2d 26, in *Delta*, 666 F.2d 21, and in *Burroughs*, 666 F.2d 27, and affirmed the order and judgments appealed from. The court held that the HRL was preempted by ERISA insofar as it required employee benefit plans to include certain benefits for pregnant workers.

ARGUMENT

For its argument, Metropolitan adopts the argument presented in Point I of the brief submitted on behalf of appellees in *Delta*, which has been consolidated with this action for purposes of appeal, and respectfully refers the Court to that argument.

CONCLUSION

The order appealed from should be affirmed in all respects.

Respectfully submitted,

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October 12, 1982

Appellant's Reply Brief

No. 81-1578

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IN THE

Supreme Court of the United States

October Term, 1981

ROBERT R. SHAW, Individually and in his capacity as Acting Commissioner of the New York State Division of Human Rights; ANN THACHER ANDERSON, Individually and in her capacity as General Counsel of the New York State Division of Human Rights; the NEW YORK STATE DIVISION OF HUMAN RIGHTS, an agency of the Executive Department of the State of New York; WILLIAM B. KROEGER, Individually and in his capacity as Chairman of the New York State Workers' Compensation Board; and the NEW YORK STATE WORKERS' COMPENSATION BOARD,

Appellants,

against

DELTA AIR LINES, INC., U.S. AIR, INC., PIEDMONT AVIATION, INC., BRANIFF AIRWAYS, INC., REPUBLIC AIRLINES, INC., EASTERN AIR LINES, INC., NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., OZARK AIR LINES, INC., AMERICAN AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., and UNITED AIR LINES, INC.,

Appellees.

ROBERT R. SHAW, As Acting Commissioner of the New York State Division of Human Rights,

Appellant,

against

BURROUGHS CORPORATION,

Appellee.

ROBERT R. SHAW, As Acting Commissioner of the New York State Division of Human Rights, the NEW YORK STATE DIVISION OF HUMAN RIGHTS, and the NEW YORK STATE HUMAN RIGHTS APPEAL BOARD,

Appellants,

against

METROPOLITAN LIFE INSURANCE COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

	PAGE
Statement	2
Argument	3
I. The HRL	3
A. Appellees Ignore the Plain Language of ERISA § 514(d)	3
B. Appellees' Reliance on the ADEA Is Misplaced	8
II. The DBL	10
Conclusion	13

TABLE OF AUTHORITIES

PAGE

Cases:

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) 9

Arizona Governing Comm. v. Norris, 671 F.2d 330 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3287 (U.S. Oct. 5, 1982) (No. 82-52) 7

Brooklyn Union Gas Co. v. New York Human Rights Appeal Board, 41 N.Y.2d 84 (1976) 7

City of Chicago v. Atchison, Topeka & Santa Fe Ry. Co., 357 U.S. 77 (1958) 10

City of El Paso v. Simmons, 379 U.S. 497 (1965) 10

City of New Orleans v. Dukes, 427 U.S. 297 (1976) 10

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 10

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 7

Mountain States Tel. and Tel. Co. v. Commissioner of Labor and Industry, 608 P.2d 1047 (Mont. 1979), *appeal dismissed*, 445 U.S. 921 (1980) 9

Newport News Shipbuilding and Dry Dock Co. v. EEOC, 682 F.2d 113 (4th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3442 (U.S. Dec. 6, 1982) (No. 82-411) 7

Newport News Shipbuilding and Dry Dock Co. v. Schauffler, 303 U.S. 54 (1938) 10

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980) 6

United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977) 9

PAGE

Statutes:

Federal:

28 U.S.C. § 1254(2) (1966) 10

Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1975 and Supp. 1982) 8, 9

29 U.S.C. § 623(f)(2) 8, 9

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461 (1975) ..... *passim*

ERISA § 4(b)(3), 29 U.S.C. § 1003(b)(3) 10, 11, 12
ERISA § 514(a), 29 U.S.C. § 1144(a) 9, 11, 12
ERISA § 514(d), 29 U.S.C. § 1144(d) ..... *passim*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* (1981) ..... *passim*

42 U.S.C. § 2000e-5(b) 5
42 U.S.C. § 2000e-5(e) 4, 5, 6
42 U.S.C. § 2000e-7 6
42 U.S.C. § 2000e-8(b) 5, 6

State:

New York Executive Law, Art. 15 (McKinney 1982) (Human Rights Law) ("HRL") ..... *passim*

HRL § 297.4(c) 4

New York Workers' Compensation Law, Art. 9 (McKinney 1965 and Supp. 1981-1982) (Disability Benefits Law) ("DBL") ..... *passim*

Regulations:

29 C.F.R. § 860.120(a)(1) (1981) 9
29 C.F.R. § 860.120(b) (1981) 9

PAGE

Legislative History:

110 Cong. Rec. 7205 (1964) 6
110 Cong. Rec. 7214 (1964) 6
110 Cong. Rec. 7216 (1964) 6
110 Cong. Rec. 7243 (1964) 6
110 Cong. Rec. 12,724-12,725 (1964) 6

Other Authorities:

Fed. R. Civ. P. 12(b)(6) 10

2A *Moore's Federal Practice* ¶ 12.08 (1968 and Supp. 1982-1983) 10

No. 81-1578

IN THE

Supreme Court of the United States

October Term, 1981

ROBERT R. SHAW,* *etc., et al.*,

Appellants,

against

DELTA AIR LINES, INC., *et al.*,

Appellees.

ROBERT R. SHAW, *etc.*,

Appellant,

against

BURROUGHS CORPORATION,

Appellee.

ROBERT R. SHAW, *etc., et al.*,

Appellants,

against

METROPOLITAN LIFE INSURANCE COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR APPELLANTS

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* Effective October 15, 1982, Werner H. Kramarsky resigned as Commissioner of the New York State Division of Human Rights and was replaced by Robert R. Shaw as Acting Commissioner. Appellee Airlines have consented to the substitution of Shaw for Kramarsky as an appellant in the *Delta Air Lines* appeal, where Kramarsky was sued in both his official and individual capacities. Pursuant to Rule 40.3 of the Rules of this Court, Shaw has been automatically substituted in the other appeals, where Kramarsky was sued only in his official capacity.

Statement

The essential question of this case is whether New York may lawfully prohibit employers covered by the Employee Retirement Income Security Act of 1974 ("ERISA") from discriminating based on pregnancy in the terms, privileges and conditions of employment. New York's Human Rights Law ("HRL") forbids employers from discriminating based on sex, including pregnancy, and New York's Disability Benefits Law ("DBL") requires that employers provide wage replacement benefits for all non-job-related disabilities, also including pregnancy. While ERISA preemption of state laws is involved, it cannot be overlooked that this case arose from the refusal of numerous New York employers to comply with these laws by paying disability benefits to pregnant employees. Appellees try to obscure this fact, seeking to hide their discriminatory practices behind ERISA's "broad mandate" of preemption. However, Congress did not enact ERISA to allow employers to evade their obligations to their employees, and when ERISA's language and legislative history is examined, it becomes apparent that ERISA does not allow employers to engage in unlawful discrimination in violation of state law.

Appellants (at times collectively referred to as "New York") submit this reply brief to respond to appellees' arguments and to supplement the Brief for Appellants dated June 30, 1982.

ARGUMENT

I. The HRL

A. Appellees Ignore the Plain Language of ERISA § 514(d).

Would supersedure of the HRL by ERISA "alter, amend, modify, invalidate or impair" Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e, *et seq.*? The Court of Appeals failed to address this question—and appellees endeavor to avoid it—by mischaracterizing appellants' argument.[1] New York does *not* assert that, because Title VII preserves the HRL, the HRL is somehow transformed into a federal statute and, therefore, that the HRL is "saved" by ERISA § 514(d). Rather, New York relies on the precise language Congress used in § 514(d) to limit ERISA's preemptive effect so as to avoid alteration, modification or impairment of any law of the United States. In sum, New York argues that preemption of the HRL would alter, modify and impair Title VII in contravention of ERISA's mandate. (*See* Brief for Appellants at 25-29.)[2]

Appellees argue that ERISA § 514(d) never preserves state laws, only federal. (Brief of Appellee Airlines at

1. Appendix to the Jurisdictional Statement ("A——") 11-12; Brief of Appellee Airlines at 22-23.

2. Appellees argue that New York's reading of ERISA would result in preservation of all state statutes that are explicitly saved from preemption by a federal statute. (Brief of Appellee Airlines at 21 n. 22; 23 n. 28.) Appellees are wrong; no such result would ensue. Simply because Congress preserved state laws under federal statutes in addition to Title VII does not mean that preemption of those state laws would alter, modify or impair those federal statutes. Congress did not create an integrated state-federal enforcement scheme in every federal law as it did in Title VII, and under ERISA § 514(d) a separate inquiry must be made for each federal law potentially altered, modified or impaired by preemption of a state statute.

9.) In addition to contradicting the plain language of ERISA § 514(d), this argument condemns to supersedure the entire HRL as it relates to the terms and conditions of employment—both those sections offering protections co-extensive with Title VII and those offering more extensive protections. Appellees themselves recognize that their construction of § 514(d) would mean that state laws prohibiting race, sex or religious discrimination in the terms and conditions of employment are as inapplicable to ERISA-covered benefit plans as were, according to the Court of Appeals, state prohibitions of pregnancy discrimination prior to the amendment of Title VII. (Brief of Appellee Airlines at 24-25.) Thus, under appellees' theory, states would be unable to prohibit ERISA-covered employers from discriminating, for example, on the basis of race in training programs, on the basis of sex in providing health benefits, or on the basis of religion in child care programs. (*See* Brief for Appellants at 29.)

Acceptance of appellees' argument would have the additional devastating effect of disrupting Title VII's federal-state cooperative scheme for eradicating employment discrimination. The EEOC would be unable to defer any complaints charging discrimination in the provision of employee benefits, because state and local administrative agencies would be unable to "grant or seek relief" against ERISA-covered plans. 42 U.S.C. § 2000e-5(c).[3] The

3. Indeed, under appellees' reading of § 514(d), ERISA preemption might even defeat state authority over complaints of discriminatory failure to hire or discharge. In such cases, state agencies often award "make whole" relief relating to welfare or pension benefits, for example, requiring retroactive seniority or fringe benefit credits. *See* HRL § 297.4(c). If such state relief is preempted because it would result in alteration of an employer's ERISA-covered

(footnote continued on next page)

EEOC would be unable to conclude comprehensive work-sharing agreements, for state and local agencies would not be authorized to process large numbers of cases relating to ERISA-covered benefit plans. 42 U.S.C. § 2000e-8(b). As a result, the EEOC would be forced to adjudicate thousands of complaints of discrimination against ERISA-covered plans previously resolved by state agencies (or for which the EEOC would have had the benefit of state agency factual determinations, 42 U.S.C. § 2000e-5(b)), and federal courts would have to assume the burden of reviewing these decisions, previously disposed of by state courts.

Unable to ignore these far-reaching implications for Title VII caused by preemption of the HRL, appellees suggest a fall-back position: that ERISA preempts state fair employment laws extending greater protections than Title VII, but does not preempt state laws extending protections identical to those of Title VII. (Brief of Appellee Airlines at 5, 23-24; *see also* Motion of Appellee Airlines to Affirm or Dismiss at 5.) However, this limited preemption argument also must fail. If adopted, New York and other states would be unable to prevent discrimination in areas where Congress has chosen not to legislate, but where Congress intended to allow state intervention.

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benefit plan (*see* Order and Judgment of the District Court, *Delta Air Lines* ¶ (B), A75), many complainants would face dual litigation, first in state administrative agencies under state law for relief against the employer, and subsequently in the EEOC and federal court under Title VII for relief against the employer's benefit or pension plan. In fact, such preemption might render deferral impossible for *any* complaints against ERISA-covered employers; *i.e.*, without the ability to reach benefit plans, state or local authorities might not be authorized "to grant or seek relief" within the meaning of 42 U.S.C. § 2000e-5(c).

Hence, Title VII's scheme would still be impaired—a result forbidden by ERISA § 514(d).

Congress developed the federal antidiscrimination protections of Title VII with the expectation that state fair employment statutes would continue to operate.[4] Title VII's substantive protections are only one prong of a two-pronged attack on employment discrimination. The other component—indeed the primary one—is state anti-discrimination laws and state enforcement agencies, and for this reason, Congress characterized Title VII as a "states' responsibilities" bill.[5] Despite this, to support their argument, appellees belittle the role of the states, portraying state courts and agencies as mere tools to enforce the non-discrimination guarantees of Title VII. (Brief of Appellee Airlines at 23-24.)

That characterization is simply incorrect. The Title VII deferral mechanism, 42 U.S.C. § 2000e-5(c), and work-sharing agreements, 42 U.S.C. § 2000e-8(b), were created to allow state agencies to enforce their law, substantive and procedural. Under the federal-state scheme for vindication of equal employment opportunity created by Congress in Title VII, state law is applicable *in its entirety*, unless that law "purports to require or permit the doing of any act which would be an unlawful employment practice" under Title VII. 42 U.S.C. § 2000e-7.

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4. *See* 110 Cong. Rec. 7205 (1964) (statement of Sen. Clark); *id.* at 7214 (Interpretative Memorandum of Sens. Clark & Case); *id.* at 7216 (response to memorandum of Sen. Dirksen); *id.* at 7243 (statement of Sen. Case); *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 63-65 (1980).

5. *See* 110 Cong. Rec. 12,724-12,725 (1964) (statement of Sen. Humphrey).

Further, appellees' argument that ERISA only preempts state laws more protective than Title VII is unworkable, for congruence of statutory language does not necessarily mean that Title VII and state law offer identical protections. For example, Title VII and the HRL prohibit sex discrimination, yet this Court and the New York Court of Appeals reached contradictory conclusions concerning whether this prohibition encompassed pregnancy discrimination.[6] Under appellees' view of § 514(d) preemption, before the EEOC could decide whether or not to defer complaints to state agencies, it would painstakingly have to analyze state law to determine whether it, in fact, offered identical protections as Title VII. Alternatively, when the federal courts had not definitively construed certain parts of Title VII, before states could entertain complaints of violations of their laws in ERISA-covered plans, state agencies would either be forced to await rulings of this Court, or try to predict them.[7]

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6. *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976); *Brooklyn Union Gas Co.* v. *New York Human Rights Appeal Board*, 41 N.Y.2d 84 (1976).

7. This Court routinely resolves conflicts among the Courts of Appeals concerning the precise reach of Title VII's prohibitions. *See, e.g., Newport News Shipbuilding and Dry Dock Co.* v. *EEOC*, 682 F.2d 113 (4th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3442 (U.S. Dec. 6, 1982) (No. 82-411); *Arizona Governing Comm.* v. *Norris*, 671 F.2d 330 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3287 (U.S. Oct. 5, 1982) (No. 82-52). Adoption of appellees' argument would mean that every time a complaint of discrimination in the provision of employee benefits was made under state law, state administrative agencies and courts would become enmeshed in years of litigation before knowing whether their state law does or does not offer protections coextensive with Title VII, and thus could or could not be applied. The resulting procedural morass would certainly alter and modify, and probably impair and invalidate Title VII's antidiscrimination scheme.

B. Appellees' Reliance on the ADEA Is Misplaced.

Appellees use the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 ("ADEA"), to paint an ominous picture of what would result if ERISA § 514(d) is applied as written. They suggest that New York's reading of § 514(d) would mean that state laws prohibiting age discrimination would be saved in their entirety, thus wreaking havoc on employers' pension plans. (Brief of Appellee Airlines at 27-30.)

Appellees' argument is fallacious. Under § 514(d), application of a state age discrimination law to an ERISA-covered plan would depend on whether preempting that state law would "alter, amend, modify, invalidate, impair, or supersede" the ADEA.[8] And unlike this case, preemption of state age discrimination laws would not necessarily alter, amend, modify, invalidate or impair the ADEA. Unlike Title VII, which is fully applicable to ERISA-covered plans, the ADEA itself exempts a "bona fide employee benefit plan such as a retirement, pension, or insurance plan" from its prohibitions against age discrimination. 29 U.S.C. § 623(f)(2). Where an employer is observing the terms of such a plan, preemption of state age discrimination statutes by definition *could not* alter, modify, invalidate or impair the ADEA. Therefore, ERISA § 514(d) would not become operative, and could not be construed, as appellees imagine (Brief of Appellee Airlines at 28-29), to allow state age discrimination laws, for example, to prohibit ERISA plans from excluding

8. To determine § 514(d)'s effect on state laws, courts must examine federal legislation on that particular subject to decide if preemption of the state law would impair the federal scheme.

employees hired less than five years prior to normal retirement age, or to prevent ERISA plans from reducing benefits to employees working past normal retirement age. Conversely, where a particular employer's practice did not fall within the ADEA's § 623(f)(2) exemption, for example, reduction of wages to older employees, or termination of employment based on age, both the ADEA and state laws prohibiting age discrimination could be enforced.[9]

In this light, the legislative history of the 1978 ADEA amendments cited by appellees (Brief of Appellee Airlines at 29-30) contains no persuasive authority for this case.[10] Senator Javits discussed only the relationship among ERISA, the ADEA and state laws prohibiting age discrimination. This discussion is simply not relevant to ERISA's relationship to the antidiscrimination scheme of Title VII.[11]

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9. *See* 29 C.F.R. §§ 860.120(a)(1), (b) (1981); 29 U.S.C. § 623(f)(2) (1975 and Supp. 1982).

10. Statements concerning the 1978 ADEA amendments have questionable relevance to Congressional intent three years earlier in enacting an entirely different statute. *See United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 200 n. 7 (1977); *Mountain States Tel. and Tel. Co.* v. *Commissioner of Labor and Industry*, 608 P.2d 1047, 1057 (Mont. 1979), *appeal dismissed*, 445 U.S. 921 (1980).

11. Because the issue of HRL preemption can be resolved under ERISA § 514(d), this Court need not reach the more difficult question of whether, under ERISA § 514(a), the HRL is a state law that "relates to" an ERISA-covered plan. Thus, appellees' frequent reliance on this Court's opinion in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) is misplaced. *See also* Brief for Appellants at 34-36.

II. The DBL[12]

Any consideration of ERISA preemption of the DBL must begin with the fact that Congress did not intend to interfere with long-standing state regulation of disability benefits. Because the language used in ERISA to accomplish this purpose—ERISA § 4(b)(3), 29 U.S.C. § 1003 (b)(3)—is of limited assistance in resolving conflicts, such as this one, created by the increasingly varied and complex methods for providing disability and workers' compensation benefits permitted by state law, it remains all the more critical that this Court effectuate Congress' intent in drafting that exemption.[13]

The Court of Appeals, the district court, and appellees all offer different solutions to this problem of statutory

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12. Despite appellees' assertion (Brief of Appellee Airlines at 30 n. 54), even if finality is a prerequisite to appeal under 28 U.S.C. § 1254(2), *but see City of El Paso* v. *Simmons*, 379 U.S. 497, 502 (1965), the Court of Appeals ruling regarding preemption of the DBL is a final judgment. The fact that the case was remanded to the district court for a purely ministerial application of the Court of Appeals standard is of no moment, as the federal question has been finally adjudicated by the Court of Appeals for purposes of this action. *See City of New Orleans* v. *Dukes*, 427 U.S. 297, 302 (1976); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477-480 (1975); *City of Chicago* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 357 U.S. 77, 83 (1958).

13. The sole issue before the district court was construction of the language of § 4(b)(3) in conjunction with the DBL. Contrary to appellees' claim (Brief of Appellee Airlines at 31-32), their allegations that their plans are "not maintained solely to comply with" the DBL and that the DBL is superseded by ERISA (Amended Complaint—*Delta Air Lines*, ¶¶ 81, 82; JA 51) are allegations and conclusions of law, or applications of law to fact, which are not taken as admitted for purposes of a motion under *Fed R. Civ. P.* 12(b)(6). *See Newport News Shipbuilding and Dry Dock Co.* v. *Schauffler*, 303 U.S. 54, 57 (1938); 2A *Moore's Federal Practice* ¶ 12.08 at 2266-2269 (1968 and Supp. 1982-1983).

construction. However, only the district court's decision is consistent both with Congress' desire to preserve state regulation of disability benefits and with Congress' concern for federal regulation of the reporting, disclosure and fiduciary obligations of employee welfare benefit plans. (*See* Brief for Appellants at 40-47.)

Appellees' construction of "maintained solely" is the most unreasonable. In their view, whether a benefit plan falls within § 4(b)(3)'s exemption is determined by the employer's articulated purpose in providing disability benefits. Thus, if an employer can concoct any explanation for providing disability benefits other than to comply with state law (for example, for "competitive purposes"), such plan would not be "maintained solely" to comply with the state disability law, and the state law would be totally unenforceable under ERISA § 514(a). Obviously though, applicability of the three types of laws enumerated in § 4(b)(3) cannot depend on subjective reasons proffered by the very employers subject to such state laws, and the Court of Appeals correctly rejected this argument: "Congress did not intend § 4(b)(3) to empower employers to evade state regulation by engaging in a swearing contest concerning their motives" (A65).

However, the Court of Appeals interpretation of ERISA § 4(b)(3) is equally flawed. That court simply transformed ERISA's exemption of plans "maintained solely for the purpose of complying with . . . disability insurance laws," to an exemption for plans that solely contain disability insurance provisions. There is simply no justification in the statute for this limitation, and it suffers from the identical fallacy as appellees' interpreta-

tion—it allows employers to determine whether New York's DBL will be applicable to them, or preempted. (*See* Brief for Appellants at 47-48.)

The district court's reading of § 4(b)(3) makes sense. Construing § 4(b)(3) and § 514(a) consistently to allow concurrent and independent spheres of regulation (A88-A90), that court implemented Congress' intent to allow states to impose substantive disability benefits requirements, while preserving federal regulation where Congress attempted to eliminate employee welfare benefit plan abuses. The district court's decision is a common-sense construction of § 4(b)(3) that does not read "maintained solely" apart from § 4(b)(3)'s equal emphasis on continued state enforcement of the three categories of laws. Thus, plans are "maintained solely" where disability provisions are included under compulsion of state legislation. (*See* Brief for Appellants at 48-49.)

Finally, by a somewhat different route, the United States, as *amicus curiae*, reaches the same conclusion as the district court: ERISA does not preempt the DBL, and even when an employer combines disability benefits with other types of benefits in one package, the DBL is always enforceable against the employer. (Brief for the United States at 27-28.) Thus, the United States joins New York in urging this Court to vacate the Court of Appeals decision regarding the DBL, and direct that court to reinstate the district court's decision dismissing the airlines' claim that ERISA preempts the DBL. (*Id.* at 30.)

Conclusion

For the above reasons, and those detailed in appellants' brief on appeal, the judgments of the Court of Appeals should be reversed.

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IN THE

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, NOW LEGAL DEFENSE AND EDUCATION FUND, AND WOMEN'S LEGAL DEFENSE FUND, *AMICI CURIAE*

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....iii

INTEREST OF AMICI CURIAE.....1

STATEMENT OF THE CASE.....5

SUMMARY OF ARGUMENT.....5

ARGUMENT 8

I. STATE FAIR EMPLOYMENT LAWS, WHICH ARE PRESERVED BY TITLE VII AS PART OF CONGRESS' PLAN TO PROVIDE A COMPLEMENTARY, INTER-RELATED STATE AND FEDERAL SYSTEM OF EMPLOYMENT DISCRIMINATION REMEDIES, ARE NOT PREEMPTED BY ERISA.....8

A. Erisa Preserves Title VII.....15

B. State Fair Employment Laws Are An Essential Part Of Title VII's Anti-Discrimination Scheme.....19

Page

II. ERISA DOES NOT PREEMPT STATE DISABILITY INSURANCE LAWS WHICH REGULATE EMPLOYEE DISABILITY BENEFITS PLANS 39

CONCLUSION..... 54

TABLE OF AUTHORITIES

CASES: Page

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981).....passim

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).....24, 25

American Telephone & Telegraph v. Merry, 592 F.2d 118 (2d Cir. 1979).....14

Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974).....21

Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board, 41 N.Y.2d 84 (1976).....9, 28

Bucyrus-Erie Co. v. Dept. of Industry, Labor and Human Relations (DILHR) of the State of Wisconsin, 599 F.2d 205 (7th Cir. 1979), cert. denied, 444 U.S. 1031 (1980).....14, 18, 29

Cannon v. University of Chicago, 441 U.S. 677 (1979).....30

City of Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978).....33

Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc., 372 U.S. 714 (1963).....22

Page

Delta Air Lines, Inc. v. Kramarsky, 485 F. Supp. 300 (S.D.N.Y. 1980), vacated and rewarded 650 F.2d 1287 (2d Cir. 1981), on rehearing, 666 F.2d 21 (2d Cir. 1981).....19,41

EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978)..... 33

Gast v. Oregon, 36 Ore. App. 441,585 P.2d 12 (Ore Ct. App. 1978).....14

General Electric Co. v. Gilbert, 429 U.S. 125 (1976)..... 9

Hewlett-Packard Co. v. Barnes, 425 F. Supp. 1294 (N.D. Cal. 1977), aff'd., 571 F.2d 502 (9th Cir.), cert. denied, 439 U.S. 831 (1978)..... 15

International Ladies' Garment Workers' Union, Local Union No. 111 v. Human Relations Commission of the City of Allentown, 417 A.2d 1279 (Pa. Comwlth. 1980).....19

Kremer v. Chemical Construction Corporation, ___ U.S. ___, 50 U.S.L.W. 4487 (May 17, 1982 .. passim

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Page

Love v. Pullman Co., 404 U.S. 522 (1972).....23

Minnesota Mining & Manufacturing Co. v. Minnesota, 289 N.W. 2d 396 (Minn. 1979), appeal dismissed, 444 U.S. 1041 (1980)...18

Mountain States Tel. & Tel. Co. v. Commissioner, 608 P.2d 1047 (Mont. 1979), appeal dismissed, 445 U.S. 921 (1980).....19

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980).....6, 25

Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979).....33

Pervel Industries, Inc. v. Connecticut Commission on Human Rights, 468 F. Supp. 490 (D. Conn. 1978), aff'd, 603 F.2d 214 (2d Cir. 1979), cert. denied, 444 U.S. 1031 (1980).....14, 19

Peters v. Missouri-Pacific Railroad Co., 483 F.2d 490 (5th Cir.), cert. denied, 414 U.S. 1002 (1973).....36

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Thompson v. Board of Education of the Romeo Community Schools, 519 F. Supp. 1373 (W.D. Mich. 1981).....18

Page

Wadsworth v. Whaland, 562 F.2d 70 (1st Cir. 1977), cert. denied, sub. nom. Dawson v. Whaland, 435 U.S. 908 (1978).....15

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FEDERAL STATUTES:

Age Discrimination in Employment Act Amendments of 1978, Pub.L. 95-256, 92 Stat. 189, et seq (amending 29 U.S.C. §623, et seq (1970).....30, 31, 32, 33, 34

29 U.S.C. §623 (f)(2).....32

29 U.S.C. §633(a).....33

29 U.S.C. §633(b).....33

Employee Retirement Income Security Act of 1974, Pub.L. 93-406, 88 Stat. 829, Sept. 2, 1974, 29 U.S.C. §1001 et seq.....passim

29 U.S.C. §1001.....43, 45

29 U.S.C. §1002(1).....43, 44

29 U.S.C. §1002(2).....46

29 U.S.C. §1002(3).....43, 46

29 U.S.C. §1002(32).....36

Page

29 U.S.C. §1003(b).....49

29 U.S.C. §1003(b)(1).....36

29 U.S.C. §1003(b)(3)..7, 41, 48, 51

29 U.S.C. §1051.....45

29 U.S.C. §1081.....45 ,48

29 U.S.C. §1101.....45

29 U.S.C. §1144.....7, 49

29 U.S.C. §1144(a).....10

29 U.S.C. §1144(d).....5, 15

29 U.S.C. §1321.....45

Equal Employment Opportunity Act of 1972, Pub.L. 92-261, 86 Stat. 103 (1972).....16

Pregnancy Discrimination Act of 1978, Pub.L. 95-555, 92 Stat. 2076, Oct. 31, 1978, 42 U.S.C. §2000e(k).....9, 27

Title VII of the Civil Rights Act of 1964, Pub.L. 88-352, 78 Stat. 255, July 2, 1964, see 42 U.S.C. 2000e, et seq...passim

42 U.S.C. §2000e(b) 21

Page

42 U.S.C. §2000e-5(b).....23

42 U.S.C. §2000e-5(c).....22

42 U.S.C. §2000e-5(d).....23

42 U.S.C. §2000e-5(e).....23

42 U.S.C. §2000e-7.....

42 U.S.C. §2000e-8(b).....24

Title XI of the Civil Rights Act of 1964, Pub.L. 88-352, 78 Stat. 268, July 2, 1964, 42 U.S.C. §2000h-4.....20, 21

Welfare and Pension Plans Disclosure Act of 1958, Pub.L. 85-836, 72 Stat. 997, Aug. 28, 1958, 29 U.S.C. §301 et seq (repealed by ERISA).....51

STATE STATUTES:

N.Y. Executive Law, Art. 15 (McKinney 1972 & Supp. 1980-1981)(Human Rights Law).....passim

N.Y. Workers' Compensation Law, Art. 9 (McKinney Supp. 1981-1982)(Disability Benefits Law).....passim

N.Y. Workers' Compensation Law, Art. 9 §205.....39, 40

Page

N.Y. Workers' Compensation Law, Art. 9, §205(3).....40

N.Y. Workers' Compensation Law, Art. 9 §209.....50

New York Workers' Compensation Law, Art. 9, §210.....50

New York Workers' Compensation Law, Art. 9, §211(1).....50

New York Workers' Compensation Law, Art. 9, §211(2).....50

New York Workers' Compensation Law, Art. 9 §211(3).....50

New York Workers' Compensation Law, Art. 9 §211(4).....50

New York Workers' Compensation Law, Art. 9 §211(5).....50, 51

New York Workers' Compensation Law, Art. 9 §214.....50

LEGISLATIVE MATERIALS:

Congressional Record, 94th Cong., 2d Sess. 119 Cong. Rec. 30409-10 (1973).....16, 17, 18

Congressional Record, 94th Cong., 2d Sess. 120 Cong. Rec. 4726 (1973).....16

Page

Legislative History of the Employee Retirement Income Security Act of 1974, Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess. (1976).....16

S.Rep. No. 95-331, 95th Cong., 1st Sess. (1977), Reprinted in Legislative History of Pregnancy Discrimination Act of 1978 (prepared for Sen. Comm. on Labor and Human Resources)(1980)....28, 29

H.R. Rep. No. 95-948, 95th Cong., 2d Sess., (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 4749.....28, 29

Congressional Record, 95th Cong., 2d Sess., 124 Cong. Rec. S4451 (daily ed. March 23, 1978), as corrected, 124 Cong. Rec. S4767 (daily ed. April 4, 1978).....31

OTHER:

Hutchinson and Ifshin, Federal Regulation of State Law Under the Employee Retirement Income Security Act of 1974, 46 U. Chi. L. Rev. 23 (1978).....15

INTEREST OF AMICI CURIAE*

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members which is dedicated to protecting the fundamental rights of the people of the United States, including the right to equal treatment under the law. Recognizing that limitations on women's opportunities constitute a pervasive problem, the ACLU has established a Women's Rights Project to work toward the elimination of gender-based discrimination. The New York Civil Liberties Union is the New York state affiliate of the ACLU.

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* The parties have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of Court pursuant to Rule 36.2 of the Rules of this Court.

In numerous cases before this Court, the ACLU has challenged sex-based discrimination under the Fifth and Fourteenth Amendments, and has also urged the full enforcement of Title VII of the 1964 Civil Rights Act and State Fair Employment Practices Acts enacted to remedy the causes and effects of such prohibited discrimination.

The NOW Legal Defense and Education Fund (NOW LDEF) is a nonprofit civil rights organization established in 1970 to perform a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was established by the National Organization for Women, a national membership organization of over 110,000 men and women in over 700

chapters throughout the country. The NOW LDEF has participated in numerous cases before this Court to secure enforcement of legal provisions barring employment discrimination.

The Women's Legal Defense Fund is a nonprofit, tax exempt membership organization founded in 1971 to provide pro bono legal assistance to women who have been discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combating sex discrimination in employment through litigation of significant employment discrimination cases, operation of an employment discrimination counselling program, and agency advocacy before the EEOC and other federal agencies that are charged with enforcement of the equal opportunity laws. The Fund together with the ACLU and others led

the efforts to enact the Pregnancy Discrimination Act of 1978 (Pub. L. 95-555) and since its passage in 1978, has monitored its implementation through a Pregnancy Rights Monitoring Project.

Amici believe that this case, concerning both the validity of state fair employment laws and the rights of women workers disabled due to pregnancy, poses an issue of great importance to the preservation of Title VII's enforcement scheme and the eradication of sex discrimination in the provision of employee benefits. The decision of the court below significantly alters and impairs the complementary state and federal enforcement scheme contemplated by Congress when it enacted Title VII. It also contravenes the language and purpose of ERISA, enacted by Congress to

protect employee benefit rights. We urge this Court to reverse the Second Circuit's decision and to uphold the validity of these state laws enacted to protect women workers from discrimination in the provision of disability benefits.

STATEMENT OF THE CASE

Amici rely on the Statement of the Case set out in Brief for Appellants.

SUMMARY OF ARGUMENT

ERISA does not preempt New York's Human Rights law (HRL). In enacting ERISA, Congress provided that ERISA should not be construed to "alter, amend, modify, invalidate, impair, or supercede" any other federal law, 29 U.S.C. §1144 (d), and expressly intended that Title VII continue to prohibit discrimination in the provision of pension and other benefits by employers with ERISA-regulated employee benefit plans. (Point I,A.)

Title VII, in turn, preserves state anti-discrimination laws as part of a comprehensive anti-discrimination scheme. In enacting Title VII, Congress intended to foster and enhance such state fair employment laws, and created an interrelated and complementary system of enforcement which contemplates overlapping federal and state remedies. Kremer v. Chemical Construction Corporation, ___ U.S. ___, 50 U.S.L.W. 4487 (May 17, 1982); New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980). Invalidation of state laws such as New York's HRL therefore frustrates Congressional intent in enacting both ERISA and Title VII. (Point I,B.)

New York's Disability Benefits Law (DBL) regulates employee disability benefit plans, which are exempt from ERISA coverage by a specific, narrow

exemption for plans maintained solely for the purpose of complying with state disability insurance laws such as the DBL. 29 U.S.C. §1003(b)(3). This Court's decision in Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981), does not suggest a contrary result because unlike the disability benefit plans adopted in this case by Appellees, the pension plans involved in Alessi are not exempt from ERISA coverage. The DBL therefore is not preempted by ERISA, 29 U.S.C. §1144, and Appellees must comply with applicable provisions of state law requiring payment of pregnancy disability benefits. (Point II.)

ARGUMENT

I. STATE FAIR EMPLOYMENT LAWS, WHICH ARE PRESERVED BY TITLE VII AS PART OF CONGRESS' PLAN TO PROVIDE A COMPLEMENTARY, INTER-RELATED STATE AND FEDERAL SYSTEM OF EMPLOYMENT DISCRIMINATION REMEDIES, ARE NOT PREEMPTED BY ERISA

This case requires the Court to determine whether a state law prohibiting discrimination on the basis of pregnancy is preempted by the Employment Retirement Income Security Act of 1974.[1/] To resolve this issue, the Court must ascertain the Congressional intent underlying not only ERISA, but also Title VII of the Civil Rights Act of 1964,[2/] which expressly preserves state anti-discrimination laws. In this case, the State of New York elected to prohibit pregnancy-based discrimina-

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1/ 29 U.S.C. §§1001, et seq. (hereinafter "ERISA").

2/ 42 U.S.C. §§2000e, et seq. (hereinafter "Title VII").

tion[3/] prior to the time Title VII expressly included such a provision.[4/] Appellees, major airlines and other employers

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3/ Section 296 of Human Rights Law, N.Y. Executive Act. 15 (McKinney 1972 and Supp. 1980-1981), provides in pertinent part as follows:

> 1. It shall be an unlawful discriminatory practice:
>
> (a) For an employer . . . because of the age, race, creed, color, national origin, sex or disability, or marital status of any individual . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

In Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board, 41 N.Y.2d 84 (1976), The New York Court of Appeals held that HRL's prohibition against sex discrimination includes discrimination based on pregnancy, and that employers maintaining disability benefits plans must provide benefits for pregnancy on the same basis as for other covered disabilities.

4/ See Section 701(k) of Title VII, 42 U.S.C. §2000e(k), added by the Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076, effective as of April 29, 1979, reversing the rule of decision in General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (employer's exclusion of pregnancy-related benefits from coverage under disability plans did not constitute unlawful discrimination under Title VII.)

in New York, claim that this section of New York's Human Rights Law (HRL) "relates to" employee benefit plans, and that it is therefore preempted by ERISA.[5/] Amici submit that the HRL is part of a comprehensive federally-enacted scheme contemplating overlapping federal and state nondiscrimination law, which is saved from ERISA preemption by an express provision of Title VII.

The well-established principles for determining whether state laws are preempted by federal statutes were recently outlined as follows in Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522 (1981):

5/ ERISA, Title I, Section 514(a), 29 U.S.C. § 1144(a), provides in pertinent part as follows:

> . . . the provisions of this subchapter . . . shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. . . .

> Although the Supremacy Clause invalidates state laws that "interfere with, or are contrary to, the laws of Congress," the "exercise of federal supremacy is not lightly presumed." [citation omitted]. As we recently reiterated, "[p]reemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons - either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakenly so ordained.'" [citation omitted].

The Court's analysis, as stated in Alessi, "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." Id.

Alessi presented the Court with a narrow question of the validity of a portion of the state workers' compensation law in light of ERISA's preemption provision. No other federal statute was involved. The Court therefore construed only Section 514(a) of ERISA, which explicitly preempts state laws insofar as they "relate to" any employee benefit

plan, and had no need to consider Section 514(d), which preserves other federal laws. Retired workers receiving workers' compensation benefits challenged the offset of these benefits against their pension payments, contrary to state statute which prohibited workers' compensation benefits from being set off against employees' retirement pension benefits. Alessi considered whether the state statute, "ostensibly regulating a matter quite different from pension plans," could be characterized as a state law that "relate[s] to any employee benefit plan." The Court held that the statute was preempted by ERISA because its effect was to regulate pension benefit calculations in a way which directly conflicted with federal law:

> Whatever the purpose or purposes of the New Jersey statute, we conclude that it "relate[s] to pension plans" governed by ERISA because it eliminates one

> method for calculating pension benefits - integration - that is permitted by federal law. . . . We need not determine the outer bounds of ERISA's pre-emptive language to find this New Jersey provision an impermissible intrusion on the federal regulation scheme." (footnote omitted) (emphasis added).

Id. at 524-525.

In contrast, the HRL does not mandate provision of specific benefits to employees or proscribe a method for calculating benefits which federal law permits. It merely prohibits discrimination in the administration of whatever benefits the employer has chosen to provide. There is therefore no conflict of the sort found in Alessi, nor is there any reason to believe that Congress, in enacting ERISA, intended to forbid state law from barring the discriminatory provision or calculation of employee benefits.

Even assuming arguendo that New York's Human Rights Law is a law which

"relates to" appellees' employee benefit plan within the meaning of ERISA,[6/] it is not preempted because Congress did not intend ERISA, which in Section 514(d) preserves federal laws, to preempt a state law preserved by Title VII of the Civil Rights Act of 1964.[7/]

6/ Lower courts have reached conflicting results with regard to whether the words "relate to" should be read broadly to encompass laws such as HRL which do not conflict with ERISA, or more narrowly to preempt only those state laws which would operate to frustrate or interfere with ERISA's administration. Most courts have adopted the broader interpretation, and have determined that state fair employment laws "relate to" employee benefit plans unless otherwise excepted. See, e.g., Pervel Industries, Inc. v. Connecticut Commission on Human Rights, 468 F. Supp. 490 (D. Conn. 1978), aff'd 603 F.2d 214 (2d Cir. 1979), cert. denied, 444 U.S. 1031 (1980); Bucyrus-Erie Co. v. Dept. of Industry, Labor and Human Relations (DILHR) of the State of Wisconsin, 599 F.2d 205 (7th Cir. 1979), cert. denied, 444 U.S. 1031 (1980); but see, e.g., Gast v. Oregon, 36 Ore. App. 441, 585 P.2d 12 (Ore. Ct. App. 1978).

7/ In the context of this case, the Court need not, and should not reach the very different ERISA preemption issues raised by other exemption provisions and other types of state laws. See, e.g., American Telephone & Telegraph v. Merry, 592 F.2d 118 (2nd Cir. 1979) (state domestic relations

(footnote continued on following page)

A. ERISA Preserves Title VII

When Congress enacted ERISA it preserved other federal laws in the broad, inclusive language of Section 514(d), codified at 29 U.S.C. §1144(d):

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supercede any law of the United States . . . or any rule or regulation issued under any such law. (emphasis added).

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law not preempted by ERISA); Wadsworth v. Whaland, 562 F.2d 70 (1st Cir. 1977), cert. denied, sub. nom., Dawson v. Whaland, 435 U.S. 908 (1978) (state law regulating content of group insurance policies purchased by employee benefit plans not preempted by ERISA); Hewlett-Packard Co. v. Barnes, 425 F. Supp. 1294 (N.D. Cal. 1977), aff'd, 571 F.2d 502 (9th Cir.), cert. denied, 439 U.S. 831 (1978)(state law regulating funding, disclosure, and quality of services delivered by health care service plans preempted by ERISA); see generally Hutchinson and Ifshin, Federal Regulation of State Law Under the Employee Retirement Income Security Act of 1974, 46 U. of Chi. L.R. 23 (1978). This case raises the issue of ERISA's explicit savings provision for other federal laws, and therefore requires consideration of the relationship between Title VII and ERISA. In contrast, none of the cases cited above involved any federal law other than ERISA.

ERISA's legislative history confirms that Congress fully intended Title VII to remain unaltered by ERISA.

During legislative debates, proposed anti-discrimination amendments to ERISA were withdrawn after a colloquy in both the Senate and House establishing Congress' understanding that Title VII applied and would continue to apply to employee benefit plans after ERISA's enactment.[8/] Senator Williams, a principal architect of both ERISA and the 1972 amendments to Title VII,[9/] expressed the

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8/ See 119 Cong. Rec. 30409-10 (remarks of Senators Mondale and Williams, Sept. 18, 1973), reprinted in 2 Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974, at 1862 (1976) (hereinafter "Legislative History of ERISA") ;120 Cong. Rec. 4726 (remarks of Representatives Abzug and Dent), reprinted in 3 Legislative History of ERISA at 3518-19.

9/ The Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (1972).

view that it was unnecessary to incorporate non-discrimination provisions into ERISA because Title VII already prohibited such discrimination. He also expressed concern that an ERISA non-discrimination provision would impede the 1972 consolidation of equal employment jurisdiction in the Equal Employment Opportunity Commission. Such a requirement would have placed enforcement jurisdiction in the Department of Labor, the federal agency charged with enforcing ERISA. Senator Williams emphasized that non-discrimination in the administration of employee benefits could be and should be enforced by the EEOC "under terms of existing law."[10/]

10/ Senators Mondale and Williams stated as follows:

> Mr. Mondale. I had intended at this time to raise my amendment incorporating non-discrimination based on race, color,
> (footnote continued on following page)

As ERISA's terms and the legislative

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national origin, religion, or sex into the basic requirements of the pending bill.

However, I understand that the distinguished Senator from New Jersey (Mr. Williams) is concerned that this approach runs counter to our actions last year in further consolidating equal employment jurisdiction in the Equal Employment Opportunity Commission.

Mr. Williams. The Senator is correct. Although I fully share your concern for full enforcement of non-discrimination requirements affecting pension and profit-sharing plans, I believe that the thrust toward centralized administration of non-discrimination in employment must be maintained. And I believe this can be done by the Equal Employment Opportunity Commission under terms of existing law.

Mr. Mondale. Does the Senator agree that discrimination based on race, color, national origin, religion, or sex affecting participation in pension or profit-sharing plans, is presently prohibited under section 703(a) of the Equal Employment Opportunity Act?...

Mr. Williams. I agree with the Senator's reading of the statute and I understand that the courts are following this view.

Mr. Mondale. ...In light of the

(footnote continued on following page)

history show, it was Congress' intent to preserve all aspects of existing Title VII law and the vigorous enforcement thereof. As discussed in the following section, the legislative history of Title VII reveals that Congress specifically intended it to foster and preserve state anti-discrimination provisions. That legislative scheme would be undermined if state anti-discrimination laws such as New York's HRL were preempted.[11/]

> Senator's views, and with the understanding that non-discrimination in pension and profit-sharing plans is fully required under the Equal Employment Opportunity Act, I will not propose my amendment at this time.

See supra note 8. The House colloquy is virtually identical.

11/ See, e.g., Bucyrus-Erie Company v. DILHR, 599 F.2d 205 (7th Cir. 1979), cert. denied, 444 U.S. 1031(1980); Westinghouse Electric Corp. v. State of Maryland, 520 F. Supp. 539 (D. Md. 1981); Thompson v. Board of Education of the Romeo Community Schools, 519 F. Supp. 1373 (W.D. Mich. 1981); Minnesota Mini.. & Manufacturing Co. v. Minnesota, 289 N.W. 2d 396 (Minn. 1979), appeal

(footnote continued on following page)

B. State Fair Employment Laws Are An Essential Part of Title VII's Anti-Discrimination Scheme

In enacting Title VII, Congress created a system of enforcement that made state fair employment laws an integral component of the federal statutory framework. The structure and language of Title VII demonstrate that Congress intended to preserve state laws as a meaningful part of the federal anti-discrimination scheme.

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dismissed, 444 U.S. 1041 (1980); Mountain States Tel. & Tel. Co. v. Commissioner, 608 P.2d 1047 (Mont. 1979), appeal dismissed, 445 U.S. 921 (1980); Liberty Mutual Insurance Co. v. State Division of Human Rights, 61 A.D.2d 822,402 N.Y.S. 2d 218 (App. Div. 1978); appeal denied, 44 N.Y.2d 644 (1978); but see Delta Air Lines, Inc. v. Kramarsky, 666 F.2d 21,25 (2d Cir. 1981), following Pervel Industries, Inc. v. Connecticut Commission on Human Rights, 603 F.2d 214 (2d Cir. 1979), aff'd 468 F. Supp. 490 (D. Conn. 1978), cert. denied, 44 U.S. 1031 (1980); International Ladies' Garment Workers' Union, Local Union No. 111 v. Human Relations Commission of the City of Allentown, 417 A.2d 1279 (Pa. Comwlth. 1980).

By its very terms, Section 708 of Title VII, 42 U.S.C. §2000e-7, preserves all state laws except those which require or permit any act which would violate Title VII:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State . . . , other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

Congress also preserved those state civil rights laws which are not inconsistent with the purposes of the federal Civil Rights Act in Section 1104 of Title XI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000h-4, which provides:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall

> any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

Title VII thus secured the states' authority to enact and enforce their own fair employment laws. Consistent with these provisions, state law may offer parallel or greater protection against employment discrimination than provided by federal law.[12/]

12/ For example, state fair employment laws commonly apply to employers with fewer than fifteen employees. Title VII, in contrast, applies only to those employers with fifteen or more employees. See 42 U.S.C. §2000e(b). States also frequently offer broader prohibitions against discrimination. New York, for example, prohibits discrimination on the basis of marital status and disability in addition to race, sex, religion and national origin. HRL §296, supra, note 3. See also, e.g., Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S.957 (1974)(requirement that contractors working on a project funded by both state and federal governments follow both a federal executive order affirmative action program and the state's more stringent requirements does not violate the Supremacy Clause). Even

(footnote continued on following page)

Moreover, Title VII purposefully and explicitly incorporates state fair employment laws and enforcement procedures as part of its federal enforcement system. In Section 706(c), 42 U.S.C. §2000e-5(c), Title VII provides that where the unlawful employment practice is alleged to have occurred in a State or locality which has a non-discrimination provision and an enforcement apparatus, "no charge may be filed [with the EEOC] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier termi-

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prior to enactment of Title VII, such state laws enjoyed a history of protection by this Court from arguments based on preemption. See, e.g., Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc., 372 U.S. 714 (1963).

nated."[13] After "deferral" to state and local agencies, the EEOC assumes jurisdiction and determines whether there is "reasonable cause" to believe the charge is true.[14] However, the EEOC must "accord substantial weight" to the state administrative determination.[15] Congress also authorized the EEOC to "cooperate with State and local agencies charged

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13/ See also Section 706(d)(notification and deferral of Commission charges), 42 U.S.C. §2000e-5(d), and Section 706(e)(time for filing charges differ if proceeding initially instituted with a state or local agency), 42 U.S.C. §2000e-5(e).

14/ In practice, when EEOC receives a charge prior to exhaustion of state or local remedies, the Commission refers the complaint to the appropriate local agency, and holds the complaint in "suspended animation." Upon termination of the state proceedings or expiration of the 60-day deferral period, whichever comes first, the EEOC automatically assumes concurrent jurisdiction of the complaint. The Court approved EEOC's "referral and deferral" system in Love v. Pullman Co., 404 U.S. 522 (1972).

15/ Section 706(b) of Title VII, 42 U.S.C. §2000e-5(b). See Kremer v. Chemical Construction Corp., __ U.S. __, 50 U.S.L.W. 4487 (May 17, 1982).

with administration of State fair employment practices laws" in funding research and mutually beneficial projects, and to enter into work-sharing agreements with those agencies to facilitate the processing of charges.[16/]

Although the "final responsibility for enforcement of Title VII is vested with federal courts," Alexander v. Gardner-Denver Co., 415 U.S. 36, 44-45 (1974), this does not relieve a federal court of the obligation to resolve state law anti-discrimination laws under its pendent jurisdiction, or to give full faith and credit to a decision of a state court with regard to an employment discrimination claim. See Kremer v. Chemical Construction Corporation, ___ U.S. ___, 50 U.S.L.W. 4487 (May 17, 1982). The

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16/ §709(b) of Title VII, 42 U.S.C. §2000e-8(b).

enforcement scheme designed by Congress was aptly described by the Court in New York Gaslight Club, Inc. v. Carey, 447 U.S. 54-65 (1980):

> It is clear from this scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination. Initial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief. See Alexander v. Gardner-Denver Co., 415 U.S. at 48-50 (emphasis added).

The legislative history of Title VII fully supports the conclusion that Congress intended the states to play an important role in the federal enforcement scheme. As extensively reviewed by the Court in Kremer v. Chemical Construction Corp., supra, the legislative history of both Title VII of the

Civil Rights Act of 1964 and the amendments to Title VII enacted in 1972[17/] demonstrates that Congress did not intend to supplant state laws, but instead sought to achieve a complementary system of enforcement:

> At the time Title VII was written, over half of the states had enacted some form of equal employment legislation. Members of Congress agreed that the states should play an important role in enforcing Title VII, but also felt the federal system should defer only to adequate state laws.

17/In 1972, at the same time Title VII was amended to give the EEOC broader enforcement power, the EEOC was directed to give "substantial weight" to state determinations. Prior to the 1972 Amendments, the EEOC was free to ignore state administrative decisions. See Kremer, supra at 4491, n. 16.

Id. at 4490-91. Congress thus intended to create a system in which federal goals would be enforced by the states without limiting the states' authority to enact and enforce their own anti-discrimination laws.[18/]

When Congress passed a post-ERISA amendment to Title VII, the Pregnancy Discrimination Act of 1978,[19/] it assumed the past and continuing validity of state laws prohibiting pregnancy discrimination,

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18/ As noted by the Court in Kremer, supra at 4490 n. 13, "New York's fair employment laws were referred to in the Congressional debates by proponents of the legislation as an example of existing state legislation effectively combatting employment discrimination."

19/ See note 4, supra.

including New York's HRL.[20/] The existence of such laws in nearly half of the states was considered to be significant not only because the bill would have little or no financial impact on employers already subject to those state laws, but also because "employers who operate in several states face different

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20/ As stated in H. Rep. No. 95-948, 95th Cong. 2d Sess. at 11, U.S. Code Cong. & Admin. News 1978, pp. 4749, 4759:

> Twelve additional States have, since Gilbert, interpreted the prohibitions on sex discrimination in their States' FEP laws to require equal treatment of pregnant workers. In three instances, State courts have so interpreted, the State FEP laws (New York, Pennsylvania, Wisconsin). . . .

See also S. Rep. No. 95-331, 95th Cong., 1st Sess. 3 (1977), specifically referring to Brooklyn Union Gas Co. v. New York State Division of Human Rights, supra.

requirements depending on the state."[21/] However, the Senate Report recognized that the existing provisions of Title VII preserving state law would permit the states with such laws to "continue . . . to enforce their state laws." (emphasis added).[22/] Congress, which had recently enacted ERISA, would not have assumed the continued enforce-

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21/ H. Rep. No. 95-948, supra at 11, U.S. Code Cong. & Admin. News, supra at 4759.

22/ S. Rep. No. 95-331, 95th Cong., 1st Sess. 3 n. 1 (1977). As concluded by the Seventh Circuit in Bucyrus-Erie Co. v. DILHR, supra, 599 F.2d at 212, the Pregnancy Discrimination Act legislative history provides "further evidence that state fair employment laws were considered to be fully embedded in the Title VII scheme for eradicating employment discrimination."

ment of state pregnancy discrimination laws if it thought that such laws had been preempted by ERISA.[23/]

When Congress elected to foreclose certain state laws on age discrimination, it did so expressly. In the debates in the Senate on the Age Discrimination in Employment Act (ADEA) Amendments of 1978,[24/] Senators Williams and Javits

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23/ The Senate architects of ERISA, Senators Williams and Javits, were also managers of the Senate bill which was later passed and signed into law as the Pregnancy Discrimination Act. Cf. Cannon v. University of Chicago, 441 U.S. 677,711 (1979) ("[T]he relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was.")

24/ Pub. L. 95-256, 92 Stat. 189, et seq. (amending 29 U.S.C. §623, et seq. (1970)).

emphasized that "ERISA's preemption of State age discrimination laws shall be determined without regard to section 514(d) of ERISA [savings clause for federal laws] or the fact that the ADEA does not itself preempt State law." (emphasis added).[25/]

The Second Circuit mistakenly relied on the ADEA legislative history in its rejection of the "double savings" clause argument for state fair employment laws preserved by Title VII. Unlike race, sex, or national origin, age inevitably and progressively changes and is thus properly a factor in the calculation of pension and certain insurance benefits.

25/ 124 Cong. Rec. S4451 (daily ed. March 23, 1978), as corrected, 124 Cong. Rec. S4767 (daily ed. April 4, 1978).

Accordingly, unlike Title VII, the ADEA contains an explicit exception for discrimination by employers that are observing the terms of "any bona fide employee benefit plan."[26/]

26/ 29 U.S.C. §623(f)(2) provides as follows:

> It shall not be unlawful for an employer . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual . . . or permit the involuntary retirement of any individual . . . because of the age of such individual.

This exception defines a major difference between the ADEA and Title VII. For example, although an employer is prohibited under Title VII from discriminating on the basis of race or sex in the payment of employee pension benefits,[27] the employer remains free under the ADEA to compute the amount of such benefits on the basis of age. Like Title VII, the ADEA otherwise preserves state laws[28] and establishes an enforcement scheme nearly identical to the state-federal enforcement scheme adopted in Title VII.[29] See Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979). The

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27/ See, e.g., City of Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978); EEOC v. Colby College, 589 F.2d 1139,1144 (1st Cir. 1978).

28/ 29 U.S.C. §633(a).

29/ 29 U.S.C. §633(b).

Congress in 1978 recognized that to prevent state age discrimination laws from prohibiting use of age as a classifier for benefits paid under employee benefit plans, which was permitted by the ADEA and ERISA, it was necessary for Congress to state clearly its intent that ERISA preempts state age discrimination laws insofar as they "relate to" any employee benefit plan, and to emphasize that application of Section 514(d) would not save such laws from invalidation. Read in context, therefore, the legislative history of ADEA suggests that Senators Williams, Javits and others in the Senate were aware of a potential conflict between ERISA and state laws broader than the ADEA, and took action in response; but in an analogous situation, they apparently did not perceive a similar conflict between ERISA and state pregnancy discrimination laws.

It is apparent from the language, structure, and legislative history of Title VII that Congress acknowledged and relied upon the existence of state non-discrimination laws, and intended to preserve those laws as an integral part of Title VII's enforcement scheme. Appellees' interpretation of ERISA and Title VII, on the other hand, not only directly conflicts with Congressional intent, but also leads to anomalous and inconsistent results under state fair employment laws.

Under Appellees' approach, employers would be free to disregard such state laws, or be held liable thereunder, purely on the basis of whether their employee benefit plan is subject to regulation by ERISA. For example, assuming that New York City's plan is exempt from ERISA under the ex-

ception for governmental plans,[30] the city would be subject to liability under HRL for discriminating on the basis of pregnancy in its disability plan, while the private employers involved in this case, and other private companies within the state, could discriminate with impunity as long as they operate an ERISA covered plan. Moreover, under Appellees' approach, if a private employer with fewer than fifteen employees (not subject to Title VII) operates a pension plan covered by ERISA, presumably the employer would not be liable for discriminating against black employees in the provision of retirement benefits,[31] even if such discrimination

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30/ 29 U.S.C. §1003(b)(1); 29 U.S.C. §1002(32).

31/ See generally Peters v. Missouri-Pacific Railroad Co., 483 F.2d 490 (5th Cir.), cert. denied, 414 U.S. 1002 (1973)(unlawful under Title VII).

were unlawful under state law. However, if that same employer hired one more employee, and therefore became subject to Title VII, the employer then could be held liable under either state or federal law. Such results frustrate not only the important state policies embodied in state anti-discrimination law, but also the Congressional intent expressed in Title VII that states fully enforce state anti-discrimination laws which advance the purposes of Title VII.

In sum, invalidation of state fair employment laws would significantly "alter" and "impair" beneficial aspects of Title VII's enforcement scheme, as prohibited by Section 514(d) of ERISA.

See supra at pp. 15-18. The Second Circuit's approach must therefore be rejected as contrary to Congressional intent in enacting both Title VII and ERISA.

II. ERISA DOES NOT PREEMPT STATE DISABILITY INSURANCE LAWS WHICH REGULATE EMPLOYEE DISABILITY BENEFIT PLANS

This case also presents the analytically separate issue of whether ERISA preempted New York's Disability Benefits Law (DBL), which required employers to provide up to eight weeks of disability benefits for employees disabled due to pregnancy.[32/] Unlike the HRL, which

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32/ Section 205 of the Disability Benefits Law, N.Y. Workers' Compensation Law (McKinney Supp. 1981 & 1982) provided in pertinent part as follows:

> No employee shall be entitled to benefits under this article: 1) for more than twenty-six weeks during a period of fifty-two consecutive calendar weeks or during any one period of disability; 3) notwithstanding any other provision of law, for a period of disability in excess of eight weeks caused by or arising in connection with a pregnancy except for a period of disability occurring as a result of a complication of such pregnancy, and the liability of the employer or the chairman as provided in

(footnote continued on following page)

merely prohibits discrimination against employees disabled due to pregnancy, the DBL affirmatively required employers to provide minimum pregnancy disability benefits as part of the state's comprehensive regulation of employee disability plans. The Court accordingly must determine whether the DBL requirement is preempted, or whether instead this case falls within ERISA's specific exemption for "plans" maintained "solely" to comply with certain narrow categories of applicable state law, including dis-

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> this article shall be the exclusive statutory remedy of an employee for disability caused by or arising in connection with a pregnancy (emphasis added).

Section 205(3), L.1977, ch. 675, §29, effective August 3, 1977. This provision has since been repealed (L. 1981, ch. 352), effective June 29, 1981. DBL now treats disabilities related to pregnancy in the same manner as other disabilities.

ability insurance laws.[33/]

The Second Circuit decided that ERISA preempts state disability insurance laws, unless the employer creates a separate administrative unit to provide statutory benefits.[34/] This construction

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33/ 29 U.S.C. §1003(b)(3) provides as follows:

> The provisions of this subchapter shall not apply to any employee benefit plan if such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws (emphasis added).

ERISA's preemption provision, 29 U.S.C. §1144, supercedes state laws insofar as they relate to any employee benefit plan "not exempt under section 1003(b)" (emphasis added).

34/ The Second Circuit's DBL decision, Delta Airlines, Inc. v. Kramarsky, 650 F.2d 1287, 1302-1307 (2d Cir. 1981), vacating and remanding 485 F. Supp. 300 (S.D.N.Y. 1980), remained unchanged by the decision on rehearing, 666 F.2d 21,26 (2d Cir. 1981).

leads to the anomalous result that the form in which employers choose to administer benefits can be determinative of ERISA's preemptive effect. The Second Circuit's decision contradicts the language and structure of the Act, frustrates Congressional intent to preserve state regulation of employee disability benefits plans, and elevates form over substance.[35/]

Amici urge instead that, consistent with Congressional intent, the word "plan" must be construed according to the type of benefit or benefits the plan provides.

35/ By determining preemption according to whether the employer chooses to establish a separate unit to administer the benefits, the lower court placed the controlling factor in the hands of the employer. The employer could easily evade state or federal law, therefore, by manipulating the form of benefit coverage. This result frustrates the central purpose of ERISA, which is designed to protect employees' rights to benefits, not to provide a shield for employers.

Congress enacted ERISA to protect employee benefit rights by comprehensive regulation of employee benefit plans.[36] The term "employee benefit plan" is an all-inclusive one, and refers to all plans regulated by ERISA.[37] ERISA itself, however, categorizes plans and applies varying requirements for plans according to the type of employee benefit provided. For example, welfare benefit plans, which include disability plans,[38] need only comply with provi-

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36/ See 29 U.S.C. §1001.

37/ 29 U.S.C. §1002(3).

38/ 29 U.S.C. §1002(1) broadly defines an "employee welfare benefit plan" and "welfare plan" as

> any plan, fund or program . . . is established or maintained by an employer . . . to the extent that such plan, fund or program

(footnote continued on following page)

sions requiring the disclosure and reporting of financial and other information and with the fiduciary standards established by the Act. Pension plans, in contrast, must comply with all of these requirements, and additionally comply with the Act's minimum funding, participation and vesting standards, and with provisions requiring plan termina-

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was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care of benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services. . . . (emphasis added).

tion insurance.[39/] ERISA thus substantively and comprehensively regulates "plans" providing pension benefits, but much less closely regulates those providing welfare benefits.

Congress recognized that employee benefit plans often provide a variety of benefits in a single package. Accordingly, the word "plan" encompasses both the overall employee benefit plan, and subparts thereof. For example, in some instances, the "plan" refers to both a

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39/ See the Congressional declaration of policy in 29 U.S.C. §1001, and the following coverage provisions: 29 U.S.C. §§1051 (participation and vesting), 1081 (funding), 1101 (fiduciary responsibility), 1321 (plan termination insurance).

pension plan and a welfare plan.[40] The terms "pension plan"[41] and "welfare plan"[42] are themselves defined to

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40/ 29 U.S.C. §1002(3) provides as follows:

> The terms "employee benefit plan" or "plan" means an employee welfare benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

41/ 29 U.S.C. §1002(2) defines an "employee pension benefit plan" and "pension plan" as

> any plan, fund, or program . . . maintained by an employer . . . to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program (A) provides retirement income to employees, or (B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond . . . (emphasis added).

42/ See supra, note 38.

include any "plan, fund, or program" maintained for the purpose of providing a certain specified kind of benefit or benefits. For example, a welfare "plan" could be one which contains either a medical surgical benefit "plan" or a disability benefit "plan," or both. Thus, in determining the applicability of ERISA's requirements, the question that must be answered is not whether the individual components are separately administered, but whether the "plan, program, or fund" providing the specific type of benefit is subject to the Act's requirements. For instance, although a welfare and pension benefit plan may be administered in one unit, the entire plan does not thereby become subject to ERISA's minimum funding requirements; only the pension component of the plan would be required to comply

with such standards.[43/] Conversely, adding a welfare benefit component to a pension benefit plan would not release the pension plan from complying with the otherwise applicable ERISA standards. The same principles apply to the separate components of welfare plans. The employer's act of combining medical-surgical benefit coverage with disability benefit insurance coverage does not in itself determine whether ERISA's requirements apply.

ERISA exempts from coverage "plans" maintained solely for the purpose of complying with "disability insurance laws." 29 U.S.C. §1003(b)(3). New York's DBL is such a "disability insurance law." Appellees' disability benefit plans, types of welfare plans, are maintained in their present form solely

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43/ See 29 U.S.C. §1081

to comply with the provisions of New York's disability law.[44/] ERISA thus exempts the DBL from preemption, 29 U.S.C. §1144, because plans adopted solely to comply with its provisions are exempt from ERISA coverage, 29 U.S.C. §1003(b).

There is no doubt in this case that the DBL, a "disability insurance law," is part of a comprehensive state scheme to regulate employee disability benefit plans; the DBL ensures minimum amounts of replacement income for employees unable to work because of

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44/ Appellees do not dispute either that they would pay pregnancy disability benefits "solely" to comply with DBL, or that the DBL "relates to" their employee benefit plans.

disability.[45] New York gives employers the option to participate in a state administered fund financed by employer and employee contributions,[46] or to provide the required benefits through private insurance, a plan of self-insurance, or some other plan subject to state approval.[47] The state will

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45/ See Standard Oil Co. of California v. Agsalud, 442 F. Supp. 695 (N.D. Cal. 1977), aff'd 633 F.2d 760,764 (9th Cir. 1980), ___ U.S. ___ 102 S. Ct. 79, (1981)(state law regulating employee prepaid health care plans not a "disability insurance law" within the meaning of ERISA's exemption).

46/ Disability Benefits Law, N.Y. Work. Comp. Law, §§209, 210, 211(1), 214 (McKinney 1965 & Supp. 1981-1982).

47/ Disability Benefits Law, N.Y. Work. Comp. Law §211(2)(3)(4)(5) (McKinney 1965 & Supp. 1980-1981).

approve a private disability benefits program if it provides benefits "at least as favorable" to employees as those provided by the state fund.[48]

Because all employers in New York must pay disability benefits by a "plan" approved by the State, an employer will choose a payment option solely to comply with both the minimum substantive standards and procedural method of payment required by DBL.[49]

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48 / Id. §211(5).

49 / ERISA's express exemption in 29 U.S.C. §1003(b)(3) for plans maintained solely to comply with state unemployment compensation, workers' compensation, and disability insurance laws is nearly identical to a parallel provision in its predecessor Act, the Welfare and Pension Plans Disclosure Act of 1958, §4(b)(2), Pub. L. No. 85-836, 72 Stat. 997 (WPPDA), 29 U.S.C. §303(b)(2)(repealed by ERISA). At the time the WPPDA was enacted, only four states had employee disability insurance laws, including New York, New Jersey, California (permitting coverage through insurance companies, a state plan fund, or self-insurance), and Rhode Island (exclusively a publicly operated plan). Such laws remain in a small minority today. See Standard Oil Co. of California v. Agsalud, supra, 442 F. Supp. at 699-702.

The Court's recent decision in Alessi does not suggest a contrary interpretation.[50/] In Alessi, the state workers' compensation law was invalidated, not because it regulated workers' compensation benefits, but because it had impermissibly regulated the method of calculating pension benefits. In its traditional application, state workers' compensation law would have had

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50/ See Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504,523 n. 20 ("The only relevant state laws, or portions thereof, that survive [ERISA's] preemption provision are those relating to plans that are themselves exempted from ERISA's scope. And the relevant exemption from ERISA's coverage - for plans maintained solely for compliance with state workers' compensation laws - has no bearing on the plans here, which more broadly serve employee needs as a result of collective bargaining. As retirees do not, and cannot, claim that the plans involved here are free from ERISA's coverage, they cannot claim the exception to pre-emption restricted to laws governing such exempted plans").

no bearing on the pension "plans" involved in Alessi, which served the employees' need for retirement pension income, not the need for receiving compensation for on-the-job injuries. In contrast, New York's disability insurance law, and the employee disability benefit "plans" it regulates, both apply directly and solely to payment of disability benefits. Consistent with Congressional intent, therefore, the DBL must be preserved under ERISA's exemption for plans maintained solely to comply with such state laws.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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v.

DELTA AIR LINES, INC., *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE NEW YORK STATE AFL-CIO AS AMICI CURIAE

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MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE NEW YORK STATE AFL-CIO

The American Federation of Labor and Congress of Industrial Organizations and the New York State AFL-CIO respectfully move this Court for leave to file the accompanying brief *amici curiae* in support of the position of appellants in this case.

INTEREST OF THE AMICI CURIAE AND THE ISSUES COVERED IN THEIR ATTACHED BRIEF

The AFL-CIO is a federation of 102 national and international unions having a total membership of 14,500,000 working men and women. The New York State AFL-CIO is a federation of unions in that state having a total membership of over 1,000,000 New York workers. The instant case raises questions concerning the interplay between two major federal statutes enacted to protect employee rights—the Employee Retirement Income Security Act and Title VII of the Civil Rights Act—and two New York laws—the Human Rights Law and the Disability Benefits Law—directed to the same end. The decision below, contrary to Congress' intent, reads ERISA as requiring displacement of those state laws thereby substantially reducing employee protections. That erroneous conclusion is profoundly harmful to the interests of AFL-CIO union members.

In the attached brief *amicus curiae* we show that two provisions of ERISA make clear that Congress intended to leave intact the New York laws held below to be preempted. Section 514(d) of ERISA suffices to dispose of appellees' contentions regarding preemption of the Human Rights Law: Under § 514(d), the HRL provisions at issue herein cannot be superseded, because in the language of that section to do so would "alter . . . modify [and] impair" the functioning of a second federal administrative scheme, that of Title VII. And, the Disability Benefits Law is exempt from the preemptive effect of § 514(a) by the very terms of that section, which cross references to § 4(b)(3) of ERISA: As consideration of the language and the legislative history of the latter section shows, the DBL is a state statute relating to employee benefit plans, "maintained solely for the purpose of complying with applicable . . . disability insurance laws," (§ 4(b)(3)).

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amici curiae* should be granted.

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TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. Because Congress In Enacting Title VII Intended That State and Federal Equal Employment Opportunity Law Form One Interwoven Enforcement Scheme, Section 514(d) of ERISA Does Not Permit The Preemption Of State Fair Employment Laws	3
A. Title VII and State Fair Employment Protections	4
B. Effect of Partial Preemption of State Discrimination Laws on Title VII	11
II. Section 514(a) of ERISA Does Not Preempt State Laws Insofar As Those Laws Require Employers to Provide Disability Benefits and Set Minimum Standards For The Benefits Required	17
A. Statutory Language and Structure	22
B. Legislative History	24
CONCLUSION	28

TABLE OF AUTHORITIES

Cases: Page

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 13
Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) 11, 12, 22, 24
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 4, 9
Carmichael v. Southern Coal Co., 301 U.S. 495 (1937) 19
City of Los Angeles v. Manhart, 435 U.S. 702 ..... 15, 17
Cooper v. Philip Morris, Inc., 464 F.2d 9 (C.A. 6) 14
Crosslin v. Mountain States Tel. and Tel. Co., 422 F.2d 1028 (C.A. 9 1970), cert. granted, opinion vacated and remanded for further consideration, 400 U.S. 1004 (1971) 12, 14
Deyo v. City of Deer Park, 664 F.2d 518 (C.A. 5 1981) 12
Duke v. University of Texas at El Paso, 663 F.2d 522 (C.A. 5 1981) 12
Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 13
General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 9, 11, 15
General Ins. Co. of Amer. v. EEOC, 491 F.2d 133 (C.A. 9 1974) 12
Hewlett-Packard Co. v. Barnes, 425 F.Supp. 1294 (N.D. Cal. 1977), aff'd per curiam, 571 F.2d 502 (C.A. 9 1978) 26
Kremer v. Chemical Construction Corp., 50 U.S.L.W. 4487 ..... 4, 5-6, 7, 9, 14, 15
Lorillard v. Pons, 434 U.S. 575 17
Love v. Pullman Co., 404 U.S. 522 (1972) 7
Malone v. White Motor Corp., 435 U.S. 497 (1978) 25
Marshall v. Chamberlain Manufacturing Corp., 601 F.2d 100 (C.A. 3) 17
Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) 15
New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980) 4, 7, 8, 9

TABLE OF AUTHORITIES—Continued

Page

Newport News Shipbuilders and Dry Dock Co. v. EEOC, 667 F.2d 448 (4th Cir. 1982) 14
NLRB v. Gullett Gin Co., 340 U.S. 361 (1951) 19
Nueces County Hospital District v. EEOC, 518 F.2d 895 (C.A. 5 1975) 12
Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) 7, 17
Voutsis v. Union Carbide Corp., 452 F.2d 889 (C.A. 2) 14
White v. Dallas Independent School District, 581 F.2d 556 (C.A. 5 1978) 12, 14

Statutes:

California Unemployment Ins. Code § 2601 et seq... 18
Civil Rights Acts of 1964, Title VII, 42 U.S.C. § 2000e *et seq.*:
§ 705(g)(1), 42 U.S.C. § 2000e-4(g)(1) 8
§ 705(h), 42 U.S.C. § 2000e-4(h) 8
§ 706, 42 U.S.C. § 2000e-5 ..... 6, 14
§ 706(b), 42 U.S.C. § 2000e-5(b) 7, 13
§ 706(c), 42 U.S.C. § 2000e-5(c) 7
§ 706(d), 42 U.S.C. § 2000e-5(d) 7
§ 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) 7
§ 708(b), 42 U.S.C. § 2000e-7(b) 5
§ 709(b), 42 U.S.C. § 2000e-8(b) 6, 8, 13, 14
Employee Retirement Income Security Act, 1974
§ 1(a), 29 U.S.C. § 1001(a) 19
§ 3(1), 29 U.S.C. § 1002(1) 19
§ 3(2)(A), 29 U.S.C. § 1002(2)(A) 19
§ 4(b), 29 U.S.C. § 1003 .....3, 23, 33
§ 4(b)(3), 29 U.S.C. § 1003 .....3, 19, 20, 22, 23, 24, 25, 27, 28
§ 514(a), 29 U.S.C. § 1144(a) ..2, 3, 4, 11, 12, 13, 14, 16, 17, 19, 22, 23, 24, 25, 26, 27, 28
§ 514(b), 29 U.S.C. § 1144(b) 22
§ 514(c), 29 U.S.C. § 1144(c) 14
§ 514(d), 29 U.S.C. § 1144(d) 3, 4, 11, 14, 17
Federal Insurance Contributions Act, 26 U.S.C. §§ 3101-3126 19

TABLE OF AUTHORITIES—Continued

	Page
Hawaii Rev. Stat. § 392	18
New Jersey Stat. Ann. § 13-21	18
New York Disability Benefits Law:	2, 3, 19
§ 204	17
§ 205	18
§ 211	17
New York Human Rights Law, New York Executive Law, § 296	2, 3
Pregnancy Disability Act of 1978, Pub. L. No. 95-555, 42 U.S.C. § 2000e(k)	1, 8, 14
Rhode Island General Laws, § 28-11	18
Welfare and Pension Plans Disclosure Act of 1958, Pub. L. No. 85-836, 72 Stat. 997:	
§ 4(b)(2)	25, 26
Rules, Regulations, and Manuals	
Code of Federal Regulations:	
29 CFR §§ 1601.70-1601.71	7
EEOC Compliance Manual, § 5	8, 14
Legislative Materials	
110 Cong. Rec. 7218-7219	7
110 Cong. Rec. 12725 (1964)	7
110 Cong. Rec. 12817	6
110 Cong. Rec. 12819	6
110 Cong. Rec. 12820	6
H. R. 2, 93 Cong., 1st Sess. (1973)	26
H. R. Rep. No. 93-1280, 93d Cong., 2d Sess. 383	26
H. R. Rep. No. 948, 95th Cong. 2d Sess.	10
H. R. Rep. No. 1370, 87th Cong., 2d Sess. (1962)	4-5
S. Rep. No. 93-383, 93d Cong., 1st Sess. (1973)	26
S. Rep. No. 93-533, 93d Cong., 1st Sess. (1973)	26
S. Rep. No. 331, 95th Cong., 1st Sess. (1977)	10
S. Rep. No. 1440, 85th Cong., 2d Sess. (1958)	25, 26
S. Rep. No. 1734, 84th Cong., 2d Sess. (1956)	25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1578

WERNER J. KRAMARSKY, ETC., *et al.*,
Appellants,

v.

DELTA AIR LINES, INC., *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE NEW YORK STATE AFL-CIO AS AMICI CURIAE

This brief *amici curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amici curiae* in this case is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves two issues of significantly greater practical consequence than the Court of Appeals opinion might suggest. The precise circumstances that gave rise to this litigation, it is true, no longer pertain: The federal substantive law under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, has been amended by the Pregnancy Disability Act of 1978, Pub. L. No. 95-555, 42 U.S.C. § 2000e(k). As a result, em-

ployers such as appellees here have been required by federal law since April 29, 1979 to pay benefits such as those in dispute, whether or not New York so requires through either its Human Rights Law ("HRL") or its Disability Benefits Law ("DBL").

As to both issues raised in the Jurisdictional Statement, however, the judgment below, if affirmed, would, contrary to Congress' intent, necessarily displace long-established patterns of state protection for employees.

First, while the Court of Appeals did not so recognize, there is no principled basis for confining preemption of state anti-discrimination statutes to situations of clear substantive conflicts between state and federal employment discrimination laws. But the alternative—preemption of state fair employment practices laws insofar as they relate at all to employee benefits plans—would drastically alter the administration of Title VII of the Civil Rights Act, shifting much of the burden of enforcing equal employment opportunity from the states to the Equal Employment Opportunity Commission and the federal courts. And even the more limited preemption mandated by the Court of Appeals would severely impair Title VII's enforcement system as framed by Congress.

Second, preemption of the DBL, similarly, could not logically be limited to the narrow issue of pregnancy disability benefits addressed directly in the Second Circuit's opinion. Rather, the rationale of the opinion below would render effectively invalid the New York mandatory disability insurance scheme as well as the disability insurance and workers' compensation laws of many other states.

In enacting the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, Congress, to be sure, included a preemption provision, § 514(a), unusually broad in both its language and, the Court of Appeals concluded, in its evident intent as reflected in its legislative history. 650 F.2d, at 1303. As to both types of state laws

involved in this case, however, there is a provision of ERISA, other than § 514(a), that, in our view, makes it clear that Congress intended to leave intact that particular variety of state enactment. Section 514(d) of ERISA suffices to dispose of appellees' contentions regarding preemption of the HRL: Under § 514(d), the HRL provisions at issue herein cannot be superseded, because to do so would "alter . . . modify [and] impair" the functioning of a second federal administrative scheme, that of Title VII. And, the DBL is exempt from the preemptive effect of § 514(a) by the very terms of that section which cross references to § 4(b)(3) of ERISA: As consideration of the language and the legislative history of the latter section shows, the DBL is a state statute relating to plans "maintained solely for the purpose of complying with applicable . . . disability insurance laws," (§ 4(b)(3)). Since the express limitations on preemption stated in ERISA are entitled to as much weight as the general directive displacing state laws, this case should be resolved by focusing simply upon those limitations, leaving questions regarding the affirmative reach of § 514(a) to another day.

ARGUMENT

I. Because Congress In Enacting Title VII Intended That State and Federal Equal Employment Opportunity Law Form One Interwoven Enforcement Scheme, Section 514(d) of ERISA Does Not Permit The Preemption Of State Fair Employment Laws.

Section 514(d) of ERISA provides:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law.

The Second Circuit's construction of § 514(a) of ERISA as preempting the New York state law which prohibits pregnancy-related forms of sex discrimination in employee benefits is inconsistent with the interpretive direction

contained in § 514(d). For, as a consideration of the language and history of Title VII and of this Court's cases construing that provision confirm, the Court of Appeals' interpretation of § 514(a) would "alter, . . . modify [and] . . . impair" the overall state-federal integrated scheme of Title VII, several specific statutory sections and numerous EEOC regulations issued pursuant thereto. Since such a construction of ERISA violates the plain command of § 514(d), it must be rejected.

A. *Title VII and State Fair Employment Protection.*

As this Court has recognized, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*,

> was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. *Alexander v. Gardner-Denver Co.*, 415 U.S. at 48-49, 94 S. Ct. at 1011. Title VII explicitly leaves the states free, and indeed encourages them, to exercise their regulatory power over discriminatory employment practices. Title VII merely provides a supplemental right to sue in federal court if satisfactory relief is not obtained in state forums, § 706(f)(1).

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 67 (1980); see also *Kremer v. Chemical Construction Corp.*, —— U.S. ——, 50 L.W. 4487 (May 17, 1982). Pursuant to this overall plan, Title VII weaves state and federal remedies into an integrated, comprehensive scheme designed to enable this country to meet its commitment to eradicate employment discrimination.

The emphasis upon assuring a strong state role in any federal employment discrimination scheme began early in Congress' consideration of the problem of remedying such discrimination. For example, the House Committee report of a predecessor bill to Title VII addressed the problem at some length:

> E. The committee wishes to make quite clear its intention to represent the rights of States and mu-

> nicipalities which carry on effective programs to eliminate and prohibit discrimination in employment. Thus, section 10(b) of the act provides that the Commission shall, where such effective power exists and is effectively being exercised, seek written agreements with the State or municipal agency under which the Commission shall refrain from bringing civil action in a case or class of cases referred to in such agreement. This careful provision for cooperative action between the Federal agency on the one hand and the State or municipal agency on the other derives from extensive testimony before the committee from personnel administering State and municipal laws to the effect that, in their opinion, State and local laws would be strengthened by the backing of a Federal law in this area. State Commissions, as noted earlier, have encountered difficulty in dealing with the large, multiphased operations of businesses in interstate commerce and welcome Federal legislation in this area to fill the gaps in areas where they lack jurisdiction.

H.R. Rep. No. 1370, 87th Cong., 2d Sess. 8 (1962).

Provisions for division of labor between the state and federal agencies were included in the House version of the civil rights bill enacted in the succeeding Congress:

> At the time Title VII was written, over half of the states had enacted some form of equal employment legislation. Members of Congress agreed that the States should play an important role in enforcing Title VII, but also felt the federal system should defer only to adequate state laws. Congress considered a number of possible ways of achieving these goals, ranging from limiting Title VII's jurisdiction to states without fair employment laws to having Congress or the President assess the adequacy of state laws. As Title VII emerged from the House, it empowered the EEOC to assess the adequacy of state laws and procedures. § 708(b), H.R. Bill 7152, 88th Cong., 2d Sess. (1964). The Senate bill that was finally signed into law widened the state role by

> guaranteeing all states with fair employment practices laws an initial opportunity to resolve charges of discrimination. 42 U.S.C. § 2000e-5(c).

Kremer v. Chemical Construction Corp., —— U.S. ——, 50 L.W. at 4490 (footnotes omitted).[1]

As Senator Humphrey explained to the Senate, the changes made in the House bill were not intended to alter the fundamental view of Title VII as a supplement to rather than a substitute for state enforcement of employment discrimination prohibitions:

> We were concerned that States and localities be afforded every opportunity to resolve these difficult problems of racial justice by means of their own agencies and instrumentalities. In this respect it is perfectly proper to describe the substitute package as a "States rights bill," and, I may say, a "States responsibilities bill."
>
> We recognize the good sense of permitting the appropriate State agencies ample time to resolve disagreements arising under titles II and IV and VII, in particular, through voluntary conciliation and mediation. We recognized that many States already have functioning antidiscrimination programs to insure equal access to places of public accommodation and equal employment opportunity. We sought merely to guarantee that these States—and other States which may establish such programs—will be given every opportunity to employ their expertise and experience without premature interference by the Federal Government.

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[1] The House bill had provided that certain states would have permanent exclusive jurisdiction. The Senate bill substituted an approach granting all states with fair employment practice laws meeting minimum criteria sixty days of exclusive jurisdiction. See 110 Cong. Rec. 12817, 12819, & § 706. In the final bill ,the federal antidiscrimination agency also retains the option of arranging for exclusive state agency and even state court jurisdiction through worksharing agreements if satisfied with the sufficiency of the relief afforded by the state to victims of discrimination. 110 Cong. Rec. 12820 & § 709(b).

110 Cong. Rec. 12725 (1964), *see also id.*, at 7218-7219 (remarks of Sen. Clark).

From this decision to assure those states who wished to undertake it an important role in providing their citizens with protection from employment discrimination emerged "the statute's structure of cooperation between federal and state enforcement authorities," *New York Gaslight Club*, 447 U.S., at 62; *Kremer*, 50 L.W. at 4489.

For example, §§ 706(b) & (c) require a victim of employment discrimination in a state with appropriate fair employment practices legislation, first to file charges with the state anti-discrimination agency and to pursue those remedies exclusively for sixty days. And, this Court has approved EEOC's adopted system of referring charges initially filed with the federal agency to the state authority and deferring its own jurisdiction for sixty days to ensure compliance with these requirements. *Love v. Pullman Co.*, 404 U.S. 522 (1972). *See* 29 CFR §§ 1601.70-1601.71; *see also Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979). EEOC Commissioners' charges must likewise be deferred for sixty days, § 706(d). Moreover, a District Court may stay Title VII proceedings for sixty days pending completion of state proceedings, § 706(f)(1). Finally, in 1972, Congress amended Title VII to require EEOC to "accord substantial weight to final findings and orders made by state or local authorities" in state deferral proceedings, § 706(b). Through these various deferral provisions, Congress has sought to assure that states would have an opportunity to remedy acts of alleged employment discrimination, and to encourage states to do so.[2]

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[2] Under Title VII, deferral is required only with respect to state laws prohibiting discrimination on the same basis as Title VII. New York's law here at issue which forbids discrimination "based on sex" is such a law. Thus, this case does not concern a state fair employment practice statute that proscribes discrimination on some basis—for example, marital status or height and weight—not directly integrated into the Title VII enforcement scheme. However

Title VII, however, does not rely solely upon temporary deferral as a means of incorporating state discrimination prohibitions into an integrated enforcement scheme. In addition, EEOC is expressly authorized to cooperate in other ways with state fair employment enforcement agencies and to the offices of those agencies in a variety of ways assist in eradicating employment discrimination, §§ 705(g)(1), 705(h), 709(b). And, under § 709(b), EEOC may negotiate worksharing agreements whereby the state agency becomes *exclusively responsible* for investigation and resolving certain types of cases. *See* § 5 of the EEOC Compliance Manual. Worksharing is an economical as well as effective means of enforcing equal employment opportunity laws, for, at the Commission's option, these agreements may eliminate entirely the charging party's alternative of filing a civil action in federal court.

Two recent decisions of this Court, relying on aspects of the Title VII structure and history such as those recited above, have confirmed the critical role of state substantive and procedural law in the Title VII scheme. Thus, in *New York Gaslight Club v. Carey, supra*, 447 U.S., at 65, the Court held that prevailing plaintiffs may recover attorney's fees in federal court for proving unlawful employment discrimination in state agency or state court proceedings:

> It is clear from this scheme of interrelated and complementary state and federal enforcement that

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many states have statutes that, in addition to prohibiting discrimination based on sex, also forbid discrimination based on pregnancy. And even before the federal Pregnancy Disability Act was passed, some forms of pregnancy discrimination *were* included in Title VII's proscription of sex-based discrimination. See page 15, infra. In our view, the relationship between pregnancy-based discrimination and sex-based discrimination has always been so close that no differentiation should be drawn for purposes of ERISA preemption between state statutes which forbid pregnancy discrimination expressly and those which regulate it as a form of sex discrimination.

> Congress viewed proceedings before the EEOC and in federal court as *supplements to available state remedies for employment discrimination.* Initial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief. See *Alexander v. Gardner-Denver Co.*, 415 U.S., at 48-50, 94 S. Ct., at 1019-1021.
>
> Only authorization of fee awards ensures incorporation of state procedures as a meaningful part of the Title VII enforcement scheme.

The Court in *Carey* found it significant in addition that "throughout Title VII, the word 'proceeding' or its plural form, is used to refer to all the different types of proceedings in which the statute is enforced, state and federal, administrative and judicial." 447 U.S., at 62-63.

The concept that "state fair employment practice laws are explicitly made part of the Title VII enforcement scheme" is also the predicate for this Court's conclusion in *Kremer v. Chemical Construction Corp., supra*, that federal courts must accord finality to state court employment discrimination adjudication. 50 L.W. at 4492. The Court in *Kremer* viewed the matter before it as one "dealing with a state statutory right, subject to state enforcement *in a manner provided for by the federal Act*," (*id.*, emphasis supplied), and observed that a rule of preclusion would maintain "the incentive for states to work towards effective and meaningful discrimination systems" (*id.*).

In sum, Title VII does not simply leave state fair employment laws undisturbed but affirmatively incorporates such state laws into a cooperative state-federal program.[3]

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[3] Further confirmation of this conclusion with particular regard to the context of this lawsuit can be gleaned from the legislative history of the 1978 amendment to Title VII overruling *General Electric Co. v. Gilbert*, 429 U.S. 125, and making clear that Title VII *does* proscribe discrimination against pregnancy-related disabilities. In enacting the amendment, Congress expressly relied on the experience of the many states (including New York) that viewed denial

Of course, Title VII does not thereby, as the Court of Appeals noted, "transform those [state] laws into federal laws," (666 F.2d, at 26). But the vital role accorded state statutes by Title VII *does* mean that the creation of a subset of employment discrimination claims that

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of disability benefits to pregnant women as a form of sex discrimination, and upon the validity of state laws so providing:

> The requirement of fringe benefit coverage of workers disabled by pregnancy and related conditions takes two basic forms under State law: (1) a provision for coverage in some form under a State disability insurance law or (2) a requirement of equal treatment of pregnant workers under a State fair employment practice law. The requirements in (2) are in some States explicitly set forth in the State FEP law or in other States may result from agency interpretations (either in regulations or agency opinions) or State court decisions. At least 22 States, including the most populous States, now mandate some form of pregnancy disability coverage through one of the mechanisms described above. The significance of this State coverage for H.R. 6075 is manifold: First, many employers are already under a State law obligation to provide benefits to pregnant disabled workers. Passage of the bill thus has little or no economic impact on such employers. Second, employers who operate in several States face different requirements depending on the State: likewise, the rights of pregnant employees depend on the laws of the State in which they are employed.

H.R. Rep. No. 948, 95th Cong., 2d Sess., at 3. In fact, the effect of State anti-discrimination statutes which prohibited pregnancy-related discrimination was one reason given for enacting a federal bill:

> The view of nondiscrimination incorporated in H.R. 6075 is supported by the fact that almost half of the States presently interpret their own fair employment practices laws to prohibit sex discrimination based on pregnancy and childbirth.
>
> In enacting Title VII, Congress mandated equal access to employment and its concomitant benefits for female and male workers. However, the Supreme Court's narrow interpretations of Title VII tend to erode our national policy of nondiscrimination in employment. We are left in a state of national confusion and with inconsistent practices from State to State.

H.R. Rep. No. 948, 95th Cong., 2d Sess., at 3. *See also* S. Rep. No. 331, 95th Cong., 1st Sess., at 3 n.1 (1977).

states are precluded from remedying would fundamentally "alter, . . . modify . . . or impair" (ERISA, § 514 (d)) Title VII, as we now show.

B. *Effect of Partial Preemption of State Discrimination Laws on Title VII.*

The Court of Appeals opinion creates the misleading impression that the issue here is a unique and transitory one, limited in practical import to the period between the decision in *Gilbert, supra,* and the 1978 pregnancy amendment to Title VII, and restricted in substantive breadth to differences between state and federal law as to whether pregnancy is within the definition of prohibited sex discrimination. This supposition grossly underestimates the damage to the Title VII state-federal enforcement scheme that adoption of the Court of Appeals analysis would necessarily entail.

1. The opinion below rests on the premise that "[a] state statute that eliminates from ERISA-covered employee benefit plans features that are permitted by federal law is preempted." 666 F.2d at 25. Thus stated, the rationale seems to be limited to situations in which Title VII does not itself forbid the employee benefit practice complained of. Even thus limited, the Court of Appeals' construction of § 514(a) would significantly "alter . . . modify . . . and impair" the Title VII enforcement scheme. *See* Subpart (2), *infra.* But the notion that state fair employment laws are not preempted even though those laws may have an incidental impact upon ERISA-covered plans, so long as the state law's reach is no greater than that of Title VII, lacks any support in ERISA's statutory language: Section 514(a) of ERISA does not incorporate substantive provisions of entirely separate federal laws, permitting state regulation that "relates to" benefit plans if it is consistent substantively with that separate federal law but not otherwise; rather, that section preempts state laws that "relate to" such plans.[4] Thus,

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[4] The Second Circuit may have believed that *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504 (1981), supports an interpretation

the logic of the Court of Appeals' decision leads ineluctably to the conclusion that *all* state laws forbidding or remedying any form of discrimination in employee benefit plans are invalid. If so, the impact on the administration of Title VII would be enormous.

First, EEOC would not be permitted to defer to the state agency if the charge raised a fringe benefits issue. For § 706 authorizes deferral only if state law prohibits the alleged discriminatory practice, and authorizes a state agency to grant or seek relief for the victim. *See, e.g., Deyo v. City of Deer Park*, 664 F.2d 518 (C.A. 5 1981); *Duke v. University of Texas at El Paso*, 663 F.2d 522 (C.A. 5 1981); *White v. Dallas Independent School District*, 581 F.2d 556, 560 (C.A. 5 1978) (en banc); *Nueces County Hospital District v. EEOC*, 518 F.2d 895 (C.A. 5 1975); *Crosslin v. Mountain States Tel. and Tel. Co.*, 422 F.2d 1028 (C.A. 9 1970), *cert. granted*, opinion vacated and remanded for further consideration, 400 U.S. 1004 (1971), but see *General Ins. Co. of Amer. v. EEOC*, 491 F.2d 133 (C.A. 9 1974). If ERISA precludes a state from forbidding discrimination in em-

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of § 514(a) limited to state statutes which forbid what is "permitted by federal law." *Id.*, at 524. There are two reasons any such analysis based on *Alessi* must fail. First, *Alessi* expressly declined to "determine the outer bounds of ERISA's preemptive language." *Id.* Thus, the Court was not holding that the reach of § 514(a) is always limited to direct substantive conflicts with federal law.

Second, and more important, in *Alessi* the "federal law" that permitted a particular practice with regard to employee benefit plans was ERISA itself, not some entirely independent enactment. *Id.* Thus, *Alessi* was simply relying on the traditional rule that a direct conflict between a federal and a state statute may demand invalidation of the state regulation; it was because there was such a conflict that there was no need to determine the "outer bounds" of ERISA preemption. But here, ERISA itself does not either prohibit or permit sex or race discrimination in employee benefit plans. Consequently, if there were ERISA preemption, it would have to be based directly on the language of § 514(a), not, as in *Alessi*, on substantive conflict with ERISA.

ployee benefit plans, the deferral requirement would in that respect be negated.[5]

Second, construing § 514(a) in this way would eliminate the possibility of any worksharing agreements under § 709(b) of Title VII, or severely constrict the range of such agreements. Section 709(b) requires the EEOC to rescind a worksharing agreement if it "no longer serves the interest of effective enforcement of [Title VII]." Inability to grant or seek relief relating to cases directly concerning employee benefit plans would clearly preclude worksharing with respect to such cases.

But the effect of the Court of Appeals' decision in this regard may well go beyond cases which focus directly on employee benefit plans. In many employment discrimination cases, the requisite make-whole relief presumptively appropriate for discrimination in hiring, discharge, and layoff includes lost service credits for pensions and other fringe benefit plans. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). The logic of the Court of Appeals' opinion seems to subsume the ability of states to grant such relief at all, since an order granting such relief ordinarily requires deviation from the plan's terms.[6]

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[5] Of course, if no deferral is possible with regard to a given set of claims, Title VII's directive to accord substantial weight to state agency findings becomes inoperative as well, § 706(b).

[6] The Order approved by the Court of Appeals in this case may well affect a state's ability to grant any relief relating to fringe benefits. That order provides:

> (B) That insofar as the New York Human Rights Law does require or may be applied or interpreted in such a fashion as to require the alteration of Plaintiffs' Employee Benefit Plans or otherwise is so interpreted or applied to require Plaintiffs to provide benefits to employees in any manner inconsistent with the terms of the Employee Benefit Plan or to award any relief against Plaintiffs or impose any penalty on Plaintiffs for failure to so modify the terms of their Em-

If this is so, then worksharing under § 709(b) would be precluded in any case where a portion of the appropriate relief might pertain to fringe benefits subject to ERISA. *See* EEOC Compliance Manual, § 5.[7]

2. Even if read narrowly so as to cover only areas of substantive conflict between Title VII and state law, the ruling of the Court of Appeals would severely injure the integrated state-federal enforcement scheme of Title VII. For, many areas of discrimination law are unsettled, and many fact patterns tread the border of the statutory prohibitions. Whenever a defendant employer claims that the challenged employee benefit plan practice is unlawful under Title VII, the Second Circuit's construction of § 514(d) would preempt the state from holding the practice unlawful under the state law unless federal law ultimately so held. While the issue is unsettled, an administrative and judicial nightmare would ensue.

Examples of unsettled Title VII law in the employee benefit field abound. The Fourth Circuit, for example, recently addressed the question whether the Pregnancy Disability Act requires employers to provide health insurance coverage for spouses of male workers equal to that provided for female employees. *Newport News Ship-*

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ployee Benefit Plans or for failure to pay benefits to any individual when such payment would be inconsistent with the terms of said Employee Benefit Plans, such law is preempted by Section 514(a) and (c) of ERISA . . . . A-75.

[7] After *Kremer*, supra, there is also a question of the applicability of the § 706 deferral requirement where a state cannot provide full relief. The weight of authority had previously held that deferral is mandatory even if full relief is not available through the state procedure. However, these cases assumed that a prevailing charging party could pursue any additional relief to which he or she was entitled in federal court under Title VII. *See e.g., White, supra,* 581 F.2d at 560-61; *Crosslin* supra, 422 F.2d at 1030. "The statutory enforcement scheme contemplates a resort to the federal remedy if the state machinery has proved inadequate." *Voutsis* v. *Union Carbide Corp.*, 452 F.2d 889 (C.A. 2); *accord Cooper* v. *Philip Morris, Inc.*, 464 F.2d 9 (C.A. 6).

builders and Drydock Co. v. *EEOC*, 667 F.2d 448 (C.A. 4 1978). And this Court's opinion in *City of Los Angeles* v. *Manhart*, 435 U.S. 702 (1978) did not squarely decide the legality of a benefit plan requiring all employees to make equal contributions but paying more benefits to female than to male workers.[8]

A women who pursues a case in such an unsettled area of the law through the federal courts will receive a ruling on the legality of such a plan under Title VII. If, however, she should choose to pursue her claim through state administrative and judicial proceedings, the employer could, under the ruling below, defend by claiming that ERISA preempts her claim. Every state employment discrimination case concerning fringe benefits would thereby become subject to an ERISA preemption defense, and to rebut this defense, the plaintiff would have to establish a Title VII violation. Yet, it is not even clear that state courts have jurisdiction over Title VII claims in the first instance. *Kremer* 50 L.W. at 4492 n.20.

The upshot of this procedural morass will almost certainly be that plaintiffs will always choose the federal forum for discrimination claims regarding fringe benefit issues, since they will have to litigate the issue of legality under Title VII in any event. This, in turn, would debilitate efforts by EEOC towards worksharing with state agencies on cases of this sort, requiring the EEOC and

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[8] This very case, indeed, involves an area of Title VII law in which, at the time, there were no bright line rules. While *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), had held that disability benefits need not necessarily be paid for pregnancy-related disabilities, *General Electric* left open the possibility of proving that the neutral basis for exclusion of pregnancy from a benefit plan was pretextual, or that the value of fringe benefit coverage generally for men was substantially higher than for women. *Id.*, at 138-40. And, in *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977) the Court recognized that pregnancy-based discrimination could violate Title VII if it entailed imposition of a burden rather than denial of a benefit. Thus one cannot say for certain that appellee's policy here under challenge did not violate Title VII.

the federal courts to decide cases they would not otherwise face. The Title VII goal of encouraging use of state remedies would therefore be seriously undermined.

3. There is one other major impact of the Court of Appeals decision on the state-federal cooperative fabric of Title VII, and one which will ensue whether that ruling is understood to be broad (Subpart I, *supra*,) or narrow (Subpart II, *supra*): Unlike Title VII, which applies only to employers with 15 or more employees, Part I of ERISA covers all employers engaged in commerce or in any industry affecting commerce. Thus, section 514(a) of ERISA, if read as the court below would have it, would legalize race and sex discrimination in benefit plans of small employers nationwide.

Thus, for example, a small New York employer could lawfully provide women workers with no pensions while providing male workers with substantial retirement benefits. A small Texas corporation might with impunity exclude Hispanic employees from an apprenticeship training program and a small Michigan company could provide no disability insurance coverage for its black workers while covering whites. None would suffer legal liability under the preemption theory embraced by the Second Circuit in these cases. It is hard to imagine a result more at odds with Title VII, which Congress viewed as a supplement to state efforts to end discrimination.

In sum, the opinion below, if affirmed, would remake Title VII from a federal supplement to state fair employment laws and remedies into an exclusive remedy for certain claims. No longer would states be encouraged to provide protection against race and sex discrimination, greater than or equal to that created by federal law. In apprenticeship programs, prepaid legal services plans, pensions, health, life and disability insurance, no state could find a condition of employment to be discriminatory at least unless it were also established to be a Title VII violation. And for employers with under fifteen employees, the Second Circuit's decision would wholly preempt

the state's ability to outlaw invidious discrimination in fringe benefit forms of compensation. Section 514(d) was enacted as part of ERISA precisely to avoid such an impairment of federal law and policy.[9] The decision below must therefore be reversed.

II. Section 514(a) of ERISA Does Not Preempt State Laws Insofar as Those Laws Require Employers to Provide Disability Benefits and Set Minimum Standards for the Benefits Required.

New York, along with a few other states, provides by statute for wage replacement benefits during periods of employees' temporary disabilities. The statutory scheme permits employers to provide the required minimum coverage in several ways (DBL § 211), including purchase of insurance from a private carrier or self-insurance. An employer may adopt one of these alternatives only if the benefits thus provided meet standards set by the DBL concerning such central matters as the weekly benefit amount, the duration of benefits, and so on. DBL §§ 204,

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[9] In coming to the contrary conclusion, the Court of Appeals relied in part on legislative history of the 1978 amendments to the Age Discrimination in Employment Act (ADEA). 666 F.2d at 26. As we have shown, however, the reason Section 514(d) forbids the construction reached below is not simply because Title VII itself does not preempt state law; it is because of the precise way in which Title VII's structure depends on and incorporates state enforcement mechanisms. While the ADEA is procedurally similar in some respects to Title VII (see, *Oscar Meyer and Co.* v. *Evans*, 441 U.S. 750 (1979)), it is in other respects different (see *Lorillard* v. *Pons*, 434 U.S. 575, 578-79, 583-84 (1978)). Indeed, the ADEA is structurally modeled more closely on the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. than on Title VII. See *Marshall* v. *Chamberlain Manufacturing Corp.*, 601 F.2d 100 (C.A. 3). Thus, even if it were not otherwise inappropriate to give controlling weight to remarks made in Congress during the enactment of amendments to an entirely different statute (on which see *City of Los Angeles* v. *Manhart, supra*, 435 U.S. at 714; *Oscar Meyer Co., supra*, 441 U.S., at 758), automatically to transpose a conclusion regarding the effect of § 514(d) on ADEA to one regarding the effect of that section on Title VII would be improper.

205. Between 1977 and 1981, one of the minimum standards set by the DBL was that at least eight weeks benefits be provided for temporary disabilities arising in connection with a normal pregnancy.

In structure—*viz.*, in requiring that employers provide benefits of a particular type, and allowing for this to be done through private plans meeting state standards —New York's disability benefits law is similar to that of the disability insurance laws of New Jersey, California, and Hawaii,[10] and to the workers' compensation laws of a majority of the states.[11] Obviously, unless a state can set minimum standards and enforce them uniformly, the state cannot as a practical matter permit any alternative to a completely state-administered fund for the payment of mandated benefits.[12] Absent such standards, any re-

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[10] Of the other states which assure employees coverage for wage loss due to temporary disabilities, one (Rhode Island) requires employer contributions to a state-administered fund (R.I. Gen. Laws § 28-11), while others, like New York, provide the alternative of private coverage meeting state minimum standards. Cal. Unemp. Ins. Code § 2601 *et seq.*; N.J. Stat. Ann. § 13-21; Haw. Rev. Stat. § 392.

[11] As the Court of Appeals noted,

> [W]orkers compensation systems . . . are . . . diverse. Some . . . permit an employer to satisfy his obligations under state law only by participation in a state-administered insurance fund. Others permit employers to choose between participation in the state fund and the establishment of equivalent coverage through private means . . . [while] [m]any states have no state fund and merely require employers to make satisfactory private arrangements . . . *See generally* 4 A. Larson, The Law of Workmen's Compensation § 92.10 (1980).

650 F.2d at 1305-06.

[12] The Court of Appeals recognized that a completely state-administered fund is exempt from ERISA generally. 650 F.2d at 1306. However, that court erred in suggesting that an "employer's program for complying with . . . a state law [requiring contributions to a state-administered fund]" is a plan for ERISA purposes in the first place. When an employer's only role in providing a certain type of benefit is to pay whatever taxes, contributions, or premiums a state requires it to pay, it has not, it would seem,

quirement that an employer provide workers' compensation or disability benefits is meaningless. The standards are the means for assuring that protection of the type intended will in fact be available to employees.

Since the authority to set minimum standards for a particular type of required benefit is indivisible from the authority to require that type of benefit at all, the question in this case with regard to New York's DBL is whether, and if so how, Congress in enacting ERISA intended to limit the states' authority to guarantee workers' compensation, unemployment compensation, and disability insurance benefits to employees. Appellees and the Court of Appeals posit answers to this question that differ somewhat in the degree and manner to which the states are hampered in providing for mandatory coverage. Both agree, however, that § 514(a) of ERISA, even read in conjunction with § 4(b)(3),[13] prevents states that do

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"established or . . . maintained" any "program . . . for the purpose of providing its participants" any benefits (ERISA § 3(1)). Rather, the *state* has established and maintains, as a public function, the program for paying the benefits. *Cf. NLRB v. Gullet Gin*, 340 U.S. 361, 364 (1951); *Carmichael v. Southern Coal Co.*, 301 U.S. 495, 508 (1937). Were this not so, employers' obligation under the Federal Insurance Contributions Act, 26 U.S.C. §§ 3101-3126, to pay social security taxes could similarly be termed a "plan" for ERISA purposes (§ 3(2)(A)), since social security benefits include "retirement income to employees" (*id.*), and since there is no ERISA exemption for government-required pension plans. All the ERISA requirements pertaining to pension plans would then apply to an employer's "program" for paying its social security taxes. As the absurdity of this notion indicates, ERISA's purpose was to regulate only "*private*" pension plans. ERISA § 1(a) (emphasis supplied). It has no application at all to purely state-administered programs.

[13] Section 4(b)(3) reads:

> The provisions of this subchapter shall not apply to any employee benefit plan if—
>
> * * *
>
> (3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws

not chose to maintain an inflexible governmental fund system from requiring that every employee in the state be covered for losses due to employment-related or non-employment related disabilities.

Appellees, for example, maintain that an employer can escape the reach of a state's mandatory disability insurance requirement as long as the employer has some disability program, of any variety, and can show that its purpose in maintaining the program is other than to comply with state law. Motion to Dismiss or Affirm, at 5. To view the matter from the perspective of whether an individual employer *is* maintaining a plan for the purpose, "solely" or otherwise, of complying with a state statute is an exceedingly odd way of determining whether the standards in the statute are valid in the first instance: Obviously, an employer who is not complying with state law will *never* be maintaining its plan "solely" to comply with that law, and will, under this peculiar approach, therefore not have to comply. Indeed, an employer in a state mandating disability insurance with no plan at all would also not be maintaining any plan "solely for the purpose of complying with . . . disability insurance laws," and would therefore be able to continue to defy the state law. Appellees' position, then, is at bottom simply an assertion that after ERISA the states may not require compliance with social insurance laws of the New York variety.

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or unemployment compensation or disability insurance laws.

While § 4(b)(3) includes unemployment compensation "plans," at present there are no state laws which permit employers to meet their obligation with regard to unemployment benefits through private insurance or self-insurance. Thus, there are at this time no practical issues arising with regard to unemployment compensation similar to those concerning workers' compensation and disability insurance laws. It is for this reason that the references in the text are largely limited to the latter two categories of benefits.

The Court of Appeals' analysis similarly rests on the unarticulated premise that a state law requiring that employers provide workers' compensation and disability insurance and setting minimum standards to define such benefits is simply not enforceable. The court below concluded that:

> [I]f an employer maintains a separate disability plan that generally meets the requirements of applicable state disability insurance laws, the court should find that the plan was adopted 'solely' to comply with those laws . . .

650 F.2d, at 1307. Among its other flaws,[14] this analysis, once again, attempts to discover the validity of a state's determination that a particular requirement be met by assuming at the outset that an individual employer has the option of not meeting that requirement. To conclude that a state may only require an employer who already maintains a separate program consistent with a state disability or workers' compensation law to conform to that law is to say nothing more than that compliance may not be made mandatory.[15]

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[14] The Court of Appeals was of the view that if an employer does maintain an administratively separate disability plan, that plan would be entirely exempt from ERISA. But the court does not explore the implication of this rule for an employer who maintains a single nationwide disability law: Is such a plan, under the Court of Appeals' approach, unregulated by ERISA even in the vast majority of states with no disability insurance laws? If so, the covered employees in those states will be left without any legal protection at all. Also, if New York required that a plan's benefits be upgraded in some respect, would that requirement apply nationwide? While one would think not, the Court of Appeals' emphasis upon the administrative unity of plans might suggest otherwise. Finally, how does the Court of Appeals' analysis apply to an employer who has a unified nationwide benefits plan lacking *any* disability benefits component? Seemingly, precisely because such an employer has no disability benefits plan he will be able to continue to deny coverage to his New York employees.

[15] The Court of Appeals did suggest that states might be able to *require* employers to provide separate disability insurance plans. 650 F.2d at 1307, n.29. Of this alternative it suffices to note the

It is our view that the unexamined assumption underlying both appellees' and the Court of Appeals' analysis is erroneous, and that the available legislative materials make quite clear that Congress, in enacting ERISA, intended to preserve to the states a broad range of options in guaranteeing employment-related benefits of the three types covered by § 4(b)(3). The statutory language and structure, while awkward, are more consistent with this conclusion than with any other. And, the legislative history demonstrates that throughout Congress' consideration of ERISA, the continued vitality of state mandatory social insurance laws of the varieties covered by § 4(b)(3) was meant to be preserved.

A. *Statutory Language and Structure.*

Section 514(a), ERISA's otherwise-broad preemption provision (*see* p. 2, *supra*), preserves "State laws . . . insofar as they may now or hereafter relate to any employee benefit plan . . . exempt under section 4(b) of this title." Unlike the provisions of § 514(b), this limitation cannot properly be termed an "exception" to the preemption provision. Rather, it is part of the general description of the intended scope of preemption.

The Court of Appeals in this case held (650 F.2d, at 1302-03) that, for purposes of determining the breadth of preemption under § 514(a), the term "relates to" must be read expansively:

> A state law 'relate[s] to' employee benefit plans . . . whenever it has a direct [or indirect] bearing on such plans.

Id., at 1303.[16] But this broad definition has negative as well as affirmative import for preemption under § 514

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unlikelihood that a Congress concerned with limiting the reach of state benefits regulation would be willing to allow mandatory coverage legislation on the condition that uniform broad nationwide benefits plans be administratively divided to conform with state law, but not if states limit the disruption of employer's plans by allowing already existing schemes to satisfy state law.

[16] *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 523-25.

(a): Any state law that affects plans exempt from ERISA under § 4(b) remains in that respect valid. Thus, in deciding the specific question whether a particular state law relates to § 4(b) plans and is therefore valid, the symmetrical structure of § 514(a) on its face precludes any presumption or rule of construction, such as that adopted by the Court of Appeals, (650 F.2d, at 1304), favoring the displacement of state law.

Additionally, the language of § 4(b)(3) assumes that there *are* "applicable workmen's compensation . . . unemployment compensation or disability insurance" laws, since the section defines the exemption with respect to the relationship between a plan and such laws. And, the "solely" language of § 4(b)(3) indicates that a plan that is more extensive than "applicable" law demands *is* to be subject to ERISA's affirmative regulations. There is, at the same time, no suggestion in § 4(b)(3) that the "applicable" law suddenly becomes inapplicable because an employer determines to do more in the area than that law requires. Consequently, although it is true that ERISA "ordinarily does not permit 'independent and concurrent' obligations under federal law" (650 F.2d, at 1304, emphasis supplied), § 4(b)(3) appears specifically to contemplate that an employer *is* to be subject to ERISA's reporting, disclosure and fiduciary responsibility provisions while remaining obligated to maintain substantive coverage under mandatory state disability or workers' compensation laws.

Neither § 514(a) nor § 4(b)(3), viewed separately, then, dictates the displacement by ERISA of "applicable" laws guaranteeing through mandatory private plans the three forms of benefits guaranteed by § 4(b)(3). Nor do the two sections, read together, command this result: The cross-reference between § 514(a) and § 4(b)(3) is best read as preserving precisely those "applicable workmen's compensation. . . unemployment compensation or disability insurance laws" to which § 4(b)(3) refers—that is, those laws mandating that such benefits be "maintained".

Surely, such laws "relate to" those plans that *are* maintained to comply with the state's requirements. And, just as "ERISA preempts not plans, but 'State laws' " (*Alessi*, *supra*, 451 U.S. at 523 n.20), so § 514(a) should preserve from supersession not only § 4(b)(3) plans themselves, but the laws that relate principally to such plans and set the applicable standards.

One could, it is true, quarrel with this construction of § 514(a) as not completely consistent with the statutory language. But any construction of § 514(a) with regard to the question here is open to that quibble. For § 4(b)(3) is an exemption of certain plans from ERISA's affirmative coverage, defined by those plans' relationship to "applicable" law, while § 514(a) seeks to define the validity of those very laws by their relationship to certain pans. The effect, if one attempts a woodenly literal approach to the interaction between the two subsections, is an infinite circularity. The only plausible construction is one which, like that suggested above, avoids the infinite loop, and does so in a way that is most faithful to the basic thrust of each of the two subsections.[17]

B. *Legislative History.*

A brief historical look at the development of § 4(b)(3) and § 514(a) of ERISA both explains why the two provisions fit together somewhat awkwardly and confirms

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[17] As we read the brief discussion in *Alessi* concerning the interaction between § 514(a) and § 4(b)(3) (451 U.S. at 523 n.20) it is in no way inconsistent with our approach. In *Alessi*, the regulation in question, although it was codified as part of the state's workers' compensation law, purported to govern the level of benefits available under a private *pension* plan. Pension plans are not, of course, one of the three varieties of state laws included in § 4(b)(3). Consequently, the problem which gives rise to the interpretation difficulty in this case was not present in *Alessi*. The pension plan was, for reasons *unrelated to its relationship to any state law*, definitely not within § 4(b)(3). Since "the relevant exemption from ERISA . . . [had] no bearing on the

that Congress did intend to preserve the variety of state laws which set minimum standards for mandatory disability insurance and workmen's compensation benefits.

Section 4(b)(3) long predated the advent of § 514(a) in its present, expansive form, Section 4(b)(3) began life as § 4(b)(2) of the Welfare and Pension Plans Disclosure Act of 1958, Pub. L. No. 85-836, 72 Stat. 997. That section provided that WPPDA

> shall not apply to an employee welfare or pension benefit plan if . . . such plan was established and is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation disability laws.

Unlike ERISA, WPPDA "clearly anticipated a broad regulatory role for the states." *Malone v. White Motor Corp.*, 435 U.S. 497, 512 (1978). Section 4(b)(2) of WPPDA, consequently, was simply an exception from the affirmative reporting and disclosure requirements of the federal WPPDA; that section had no role in defining the limits of state regulation.

The reason for including in WPPDA the § 4(b)(2) exception to mandatory federal reporting and disclosure requirements is quite clear: Congress' concern in developing WPPDA was with "private employee benefit plans." S. Rep. No. 1440, 85th Cong., 2d Sess. at 2 (1958); *see also id.*, at 5, 6, 10. Congress was quite aware that there were in addition "various social insurance programs developed by the Federal Government, the State governments, or the two acting in cooperation," and was aware in particular that some states, including New York, "require [temporary disability insurance coverage] through insurance companies, a State fund, or self-insurance." S. Rep. No. 1734, 84th Cong., 2d Sess. at 15-16 (1956); *see also* S. Rep.

[pension] plans involved here" (451 U.S. at 523 n.20), the question of how to deal with state laws mandating one of the three categories of plans which *are* within § 4(b)(3) did not arise.

No. 1440, *supra*, at 6, 20, 26. But the "weakness, waste, abuses, and unnecessary losses to the beneficiaries" (*id.*, at 10) with which Congress was concerned in enacting WPPDA were perceived to exist only with respect to private, voluntary employee benefit plans, and not with respect to plans required, and therefore guaranteed and policed, by governmental social insurance laws. There was thought to be no need for federal intervention as to those plans tailored to those mandatory laws.

This basic decision was carried forward into ERISA, although there were minor language changes made as § 4(b)(2) of WPPDA evolved into § 4(b)(3) of ERISA.[18] While the scope of federal regulation vastly increased, the focus upon "private . . . plans" of a "voluntary nature" remained. S. Rep. No. 93-533, 93d Cong., 1st Sess., at 1 (1973); *see also* S. Rep. No. 93-383, 93d Cong., 1st Sess. at 1, 18 (1973). Consequently, Congress continued to exempt mandatory plans—that is, those "*required* under workmen's compensation, unemployment compensation or disability insurance laws" (*id.*, 18 (emphasis supplied)) from the scope of federal regulation.

The development § 514(a) of ERISA is accurately summarized in the pertinent opinion of the Court of Appeals in this case (650 F.2d, at 1303; *see also Hewlett Packard v. Barnes*, 425 F.Supp. 1294 (N.D. Cal.), *aff'd per curiam*, 571 F.2d 502 (C.A. 9)). For present purposes, the salient point is that until the Conference Committee report, the preemption provisions of ERISA "applied only to state laws that regulated ERISA's specific subject matters." *See* H.R. 2, § 514(a), (c), 93d Cong., 1st Sess. (1973). . ., H.R. 2, § 699(a), 93d Cong., 1st Sess. (1973). . ., H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 383. . ." 650 F.2d, at 1303. This being the case,

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[18] "[W]as established and is maintained" in WPPDA was altered to "is maintained" in ERISA, while "unemployment compensation disability insurance laws" was changed to "unemployment compensation or disability insurance laws."

the problem presented here did not arise until the Conference Report greatly expanded the reach of § 514(a): Obviously, ERISA never did—and still does not—regulate in any way the substance of the three types of plans covered by § 4(b)(3). Until the present language of § 514(a) was adopted, then, there was no possibility that ERISA displaced states from mandating certain types of coverage and setting standards for those benefits. And, until the present form of § 514(a) was devised, the scope of preemption was defined with respect to the subject matters regulated, and not with respect simply to the plans affected. The circular reference problem of the present structure therefore also did not exist.

However, with the advent of the new § 514(a), § 4(b)(3) of ERISA suddenly took on an additional role, and one that is the mirror-image of that for which the latter provision had originally been devised. Rather than simply defining an area free from any federal regulation, § 4(b)(3) now plays a central part in delineating as well the area of *exclusive* federal regulation. Section 4(b)(3) is not ideally phrased to fill that purpose. Having been drafted in a context in which the validity of state mandatory benefits laws was unquestionable, the section defines the plans included within its scope by reference to such laws.

Given the last-minute nature of the expansion and redrafting of § 514(a), one can assert with some confidence that the technical, linquistic problem created by these circular references was not appreciated. And one can also assert, with reasonable confidence, that had the anomaly been recognized, that anomaly would have been expressly resolved in the manner suggested in Part A, *supra*—by making clear that the change in § 514(a), though substantial, was not intended to alter the basic concern of ERISA solely with voluntary employee benefit plans, and not with the States' ability to continue to require *mandatory* social insurance programs in the three substantive areas in which those requirements pre-existed ERISA.

Indeed, the best evidence of this is that § 4(b)(3) remained in the Act when § 514(a) was amended; had Congress intended to oust the states from the role of establishing mandatory social insurance programs, that intent would in all likelihood have been manifested by excising § 4(b)(3) entirely.

In sum, the interaction between the bare words of §§ 514(a) & 4(b)(3) presents formidable construction problems that cannot be solved by pure logic. Looking at the evolution of federal benefit plan regulation, however, it becomes plain that § 514(a) at least preserved intact the basic contours of laws such as New York's DBL, and such as the worker's compensation laws of many states.

CONCLUSION

For the above stated reasons the decision below should be reversed.

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3

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No. 81-1578

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Appellee.

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METROPOLITAN LIFE INSURANCE COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF THE ERISA INDUSTRY COMMITTEE (ERIC) AND THE EQUAL EMPLOYMENT ADVISORY COUNCIL (EEAC) IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

	Page
I. INTEREST OF THE AMICI CURIAE	2
II. SUMMARY OF ARGUMENT	4
III. ARGUMENT	5
INSOFAR AS STATE CIVIL RIGHTS LAWS SEEK TO REQUIRE PLANS COVERED BY ERISA TO PROVIDE ADDITIONAL EMPLOYEE BENEFITS OR OTHERWISE REGULATE THE TERMS AND CONDITIONS OF SUCH PLANS, THESE LAWS ARE PREEMPTED BY SECTION 514(a) OF ERISA AND ARE NOT EXEMPTED BY SECTION 514(d)	5
A. State Civil Rights Laws Fall Within The Broad Preemptive Reach of § 514(a)	5
B. State Civil Rights Laws Which Relate To Benefit Plans Are Not Expressly Or Impliedly Exempted From Preemption by § 514(d)	15
IV. CONCLUSION	21

TABLE OF AUTHORITIES

Cases: Page

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) 13, 14

Andrus v. Glover Construction Co., 446 U.S. 608 (1980) 7

Bucyrus-Erie Co. v. Dept. of Industry, Labor and Human Relations of the State of Wisconsin, 599 F.2d 205 (1979), *cert. denied*, 444 U.S. 1031 (1980) 12

Bucznski v. General Motors, 451 U.S. 504 (1981) .. 4

Caminetti v. U.S., 242 U.S. 470 (1917) 5

Delta Air Lines, Inc. v. Kramarsky, 650 F.2d 1287 (2d Cir. 1981), *opinion on rehearing*, 666 F.2d 21 (1981) 3

Furnco Construction Co. v. Waters, 438 U.S. 567 (1978) 4

Greyhound v. Mt. Hood Stages, Inc., 437 U.S. 322 (1978) 5

H.K. Porter Co. v. N.L.R.B., 397 U.S. 99 (1970) 14

Hewlett-Packard Co. v. Barnes, 425 F. Supp. 1294 (N.D. Cal. 1977), *aff'd*, 571 F.2d 502 (9th Cir. 1978), *cert. denied*, 439 U.S. 831 (1978) 5

Int'l Brotherhood of Teamsters v. Daniel, 439 U.S. 551 (1979) 4

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 4

Kremer v. Chemical Construction Corp., 50 U.S. L.W. 4487 (May 17, 1982) 20

Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1980) 13

N.L.R.B. v. Insurance Agents, 361 U.S. 477 (1960) 14

National Carriers' Conference Committee v. Heffernan, 454 F. Supp. 914 (D. Conn. 1978) 6

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 20

TABLE OF AUTHORITIES—Continued

Page

Pervel Industries v. Conn. Comm'n on Human Rights, 468 F. Supp. 490 (D. Conn. 1978), *aff'd*, 603 F.2d 214 (2d Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980) 8, 13, 17

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 4

U.S. Postal Service v. Aikens, No. 81-1044 4

Westinghouse Electric Corp. v. State of Maryland Comm'n on Human Relations, 520 F. Supp. 539 (D. Md.) (1981) 13

Statutes:

Employee Retirement Income Security Act of 1974 ("ERISA") 29 U.S.C. §§ 1001 *et seq.* 2

ERISA, § 514(a), 29 U.S.C. § 1144(a) 4, 5, 6, 7, 11, 15

ERISA, § 514(c)(1), 29 U.S.C. § 1144(c)(1) 6

ERISA, § 514(c)(2), 29 U.S.C. § 1144(c)(2) 6, 11

ERISA, § 514(b)(4), 29 U.S.C. § 1144(b)(4) 6

ERISA, § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) 6

ERISA, § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B) 6

ERISA, § 514(d), 29 U.S.C. § 1144(d) 4, 15, 16

ERISA, § 3021, 29 U.S.C. § 1221 9

ERISA, § 3022(a)(4), 29 U.S.C. § 1222(a)(4) 10

Title VII, Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* 3, 4, 16

42 U.S.C. § 2000e-2 19

42 U.S.C. § 2000e-3 19

42 U.S.C. § 2000e-5 20

42 U.S.C. § 2000e-8(b) 20

42 U.S.C. § 2000e-7 ..... 16, 20

TABLE OF AUTHORITIES—Continued

Page

Title XI of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-4 16

N.Y. Executive Law, Art. 15 (McKinney 1972 and Supp. 1980) (Human Rights Law) ("HRL"), § 296 3

Legislative History:

Senate Committee on Labor and Public Welfare, Subcommittee on Labor, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974 (Three Volumes) (1976) 7, 8, 9, 10, 11, 12, 15, 17, 19

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BRIEF AMICUS CURIAE OF THE ERISA INDUSTRY COMMITTEE (ERIC) AND THE EQUAL EMPLOYMENT ADVISORY COUNCIL (EEAC) IN SUPPORT OF APPELLEES

I. INTEREST OF THE AMICI CURIAE

The ERISA Industry Committee and the Equal Employment Advisory Council submit this brief with the written consent of the parties pursuant to Supreme Court Rule No. 36.2.

The ERISA Industry Committee (ERIC) is a nonprofit corporation whose members constitute an association of more than 100 major companies, all of whom maintain benefit plans for their employees. ERIC members represent a wide cross section of American business; the benefit plans of these members are numerous and varied, and, in all, cover millions of participants. Through ERIC, member companies coordinate their views and provide practical information and recommendations to government on how the private benefit plan system functions and on the impact on plan sponsors and participants of government regulations and interpretations under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*

The Equal Employment Advisory Council (EEAC) is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of specialists and experts in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the

proper interpretation and application of EEO policies and requirements.

One of the issues in this case is whether ERISA preempts that provision of New York's Human Rights Law [1] which, as interpreted by the New York courts, requires that employee benefit plans provide coverage for disability due to pregnancy on the same basis on which other disabling conditions are covered. The court of appeals held that ERISA does preempt that state law for the period prior to April 29, 1979, when the N.Y. HRL was broader than the comparable federal requirements. *Delta Air Lines, Inc. v. Kramarsky*, 650 F.2d 1287 (2nd Cir. 1981), *opinion on rehearing*, 666 F.2d 21 (1981).

ERIC and EEAC have an interest in the preemption issue for two main reasons. First, member companies of both organizations face a significant potential monetary liability under the New York HRL or similar statutes in other states because, prior to the 1978 amendments to Title VII (42 U.S.C. §§ 2000e *et seq.*), those companies did not uniformly provide coverage for pregnancy disability on the same basis as other disabling conditions were covered. Second, members of both organizations are multi-state employers, many of whom do business in all fifty states; they are therefore legitimately concerned that any erosion of ERISA's preemption provision will subject their benefit plans to burdensome and costly state and local regulation, will severely hamper their efforts to maintain uniform and equitable benefits for their workforces, and will infringe on their ability to

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[1] N.Y. Executive Law Art. 15 (McKinney 1972 and Supp. 1980) (Human Rights Law) ("HRL"), § 296.

engage in free collective bargaining on benefits with unions representing their employees.

Accordingly, the position of ERIC and EEAC is that the decision of the court of appeals is correct and should be affirmed by this Court.[2]

II. SUMMARY OF ARGUMENT

Section 514(a) of ERISA preempts "any and all" state laws which "relate" to any employee benefit plan covered by ERISA. The legislative history of § 514(a) demonstrates that federal preemption was intended to be as broad as the statutory language indicates. The New York HRL, by requiring the payment of pregnancy benefits, "relate[s]" to ERISA-covered benefit plans, and is therefore preempted by § 514(a). Although ERISA lists certain limited exceptions to the sweeping preemption of § 514(a), the New York HRL fits within none of them. The argument that ERISA § 514(d), which provides that "[n]othing in this title shall be construed to alter . . . impair, or supersede any law of the United States", saves the N.Y. HRL is without merit because § 514(d) plainly refers to federal laws, not state laws. Nor can an exception for the N.Y. HRL be implied based on the Civil Rights Act of 1964, specifically 42 U.S.C. §§ 2000e *et seq.* The policies of

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[2] Both ERIC and EEAC have previously filed briefs *amicus curiae* in this Court on matters affecting the interests of their members. *E.g.*, (ERIC)—*Buczynski v. General Motors*, 451 U.S. 504 (1981); *Int'l Brotherhood of Teamsters v. Daniel*, 439 U.S. 551 (1979); (EEAC)—*U.S. Postal Service v. Aikens*, No. 81-1044 (awaiting argument); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

the Civil Rights Act can be fully vindicated without such an exception, whereas creating the exception would seriously undermine the objectives Congress sought to achieve in ERISA.

III. ARGUMENT

INSOFAR AS STATE CIVIL RIGHTS LAWS SEEK TO REQUIRE PLANS COVERED BY ERISA TO PROVIDE ADDITIONAL EMPLOYEE BENEFITS OR OTHERWISE REGULATE THE TERMS AND CONDITIONS OF SUCH PLANS, THESE LAWS ARE PREEMPTED BY SECTION 514(a) OF ERISA AND ARE NOT EXEMPTED BY SECTION 514(d)

A. State Civil Rights Laws Fall Within The Broad Preemptive Reach of § 514(a)

It is hardly open to dispute that state civil rights laws which "relate to" employee benefits plans are within the ambit of § 514(a). First, the statutory language is clear and unequivocal in this regard. Second, the legislative history of the preemption provision demonstrates that the provision was meant to be as sweeping as it appears to be. Third, the policy considerations which caused Congress to adopt such a sweeping preemption provision are as applicable to state civil rights laws as they are to other state laws.

The statutory language, of course, is the logical starting point in determining the full scope of preemption by ERISA. *Greyhound v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978); *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917); *Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294, 1297 (N.D. Cal. 1977), *aff'd*, 571 F.2d 502 (9th Cir. 1978), *cert. denied*, 439 U.S. 831 (1978). ERISA § 514(a) provides quite simply and directly that the provisions of Titles I and IV of ERISA "shall supersede any and all State laws

insofar as they may now or hereafter relate to any employee benefit plan . . ." which is covered by ERISA, as that coverage is set forth in § 4 of Title I. The words "any and all" mean exactly what they say: *every* state statute that fits the description of "relating to" an employee benefit plan is preempted. *National Carriers' Conference Committee v. Heffernan*, 454 F. Supp. 914, 915 (D. Conn. 1978). Moreover, Congress took care to make certain that the term "State laws" would be all-encompassing. In § 514(c)(1), it defined that term to include "all laws, decisions, rules, regulations or other State action having the effect of law, of any State." And in § 514(c)(2), Congress was equally careful to specify that " 'State' includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title."

There are certain limited categories of state laws that Congress excepted from the "any and all" preemption requirement of § 514(a). Thus, § 514(b)(4) preserves "any generally applicable criminal law of a State." And § 514(b)(2)(A) provides that "nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." However, lest the latter provide an unintended loophole for state regulatory authority, Congress added § 514(b)(2)(B) forbidding states from deeming ERISA-covered plans and trusts to be insurance companies, banks, trust companies, or investment companies.

It is well settled that where, as here, "Congress explicitly enumerates certain exceptions to a general

prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent." *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980). That intent, however, is not to be found in the legislative history of ERISA. Instead, that legislative history persuasively—indeed, unqualifiedly—shows that Congress knew exactly what it wanted to accomplish in § 514 and used unmistakably plain statutory language to achieve that objective.

Thus, the versions of ERISA which initially passed the House and Senate contained preemption provisions which were considerably more limited than the current § 514(a). The House bill provided that "part I of this subtitle shall supersede any and all laws of the States and of political subdivisions thereof insofar as they may now or hereafter relate to the reporting and disclosure responsibilities, and fiduciary responsibilities, of persons acting on behalf of any employee benefit plan to which part I applies." ERISA Leg. Hist., Vol. III at 3897, 4057-4058.[3] The Senate bill provided that "the provisions of this Act or the Welfare and Pension Plans Disclosure Act shall supersede any and all laws of the States . . . insofar as they may now or hereafter relate to the subject matters regulated by this Act or the Welfare and Pension Plans Disclosure Act. . ." ERISA Leg. Hist. Vol. III at 3598, 3820. It is evident that the approach to preemption taken in these earlier versions of ERISA is quite different from the approach taken by the House and Senate Conference Commit-

[3] Citations to "ERISA Leg. Hist." refer to the separately bound legislative history: Senate Comm. on Labor and Public Welfare, Subcomm. on Labor, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974 (Three Volumes) (1976).

tee, which rejected both the House and Senate bills and agreed on a substitute that was ultimately enacted into law. ERISA Leg. Hist., Vol. III at 4518. Whereas the earlier versions limited preemption to specific enumerated areas or "to the subject matters" regulated by federal law, the substitute preempted all state laws "as they may now or hereafter relate to any employee benefit plan" subject to certain enumerated exceptions. In short, "Congress made a clear-cut decision not to identify various subjects on which state laws were to be preempted, but instead sought to avoid constant litigation over the scope of preemption by preempting, with certain exceptions, 'all' state laws insofar as they 'relate' to plans covered by ERISA." *Pervel Industries, Inc., v. Connecticut Commission on Human Rights*, 468 F. Supp. 490, 492 (D. Conn. 1978), *aff'd*, 603 F.2d 214 (2nd Cir. 1979), *cert. denied*, 444 U.S. 1031.

That this shift in approach adopted by the Conference Committee was indeed a clear-cut and well thought-out decision is seen from the explicit statements made by three members of Congress who were most intimately involved in the drafting and passage of ERISA. As Senator Jacob Javits, the ranking minority member of the Senate Committee on Labor and Public Welfare, explained (ERISA Leg. Hist. Vol. III at 4770-4771):

> Both House and Senate bills provided for preemption of State law, but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to

> multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.
>
> Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required —but for certain exceptions—the displacement of State action in the field of private employee benefit programs. . . .
>
> . . . It is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.

Significantly, Senator Javits pointed out that the conferees fully recognized "the dimensions" of the policy embodied in the new preemption provision adopted by the Conference Committee. Nevertheless, they concluded, particularly in light of a study to be conducted by a Congressional Joint Pension Task Force, that "[i]f it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modifications can be made." ERISA Leg. Hist., Vol. III at 4771.[4]

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[4] The mechanism for continued Congressional oversight of the preemption provision, as well as other ERISA provisions, was actually written into the bill itself. Thus, ERISA § 3021 provides for the establishment of a Joint Pension Task Force, whose duties were to be carried out by the staffs of the Congressional committees having jurisdiction over pension and

The remarks of Senator Harrison Williams, Jr., Chairman of the Senate Committee on Labor and Public Welfare, were along the same lines as those of Senator Javits. In introducing the Conference Report on ERISA, Senator Williams "stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." ERISA Leg. Hist., Vol. III at 4745-46. Senator Williams emphasized that the "principle" embodied in the preemption provision of the substitute bill "is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof. . ." *Ibid.*

Likewise, on the floor of the House of Representatives Congressman John Dent, Chairman of the Subcommittee on Labor of the House Education and Labor Committee, heralded the Conference Committee version of the preemption clause as a major accomplishment (ERISA Leg. Hist., Vol. III at 4670-71):

> Finally I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation. . .

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welfare benefits legislation. ERISA § 3022(a)(4) specifies that one of the duties of the Joint Pension Task Force is to "make a full study and review of . . . the effects and desirability of the Federal preemption of State and local law with respect to matters relating to pension and similar plans."

> The conferees, with the narrow exceptions specifically enumerated, applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans. Thus, the provisions of Section 514 would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof . . . which would affect any employee benefit plan as described in section 4(a) and not exempt under section 4(b).

The formal Joint Explanatory Statement of the Conference Committee was more succinct, but nonetheless echoed the theme that "the provisions of Title I are to supersede all State laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate commerce." ERISA Leg. Hist., Vol. III at 4650. The Joint Explanatory Statement also noted that the substitute bill "provides that the congressional Pension Task Force is to study this provision and report back to the labor committees of the Congress on the results of its study." *Ibid.*

Although § 514(a) preempts state laws which "relate to" employee benefit plans, there is no precise statutory definition of that term. However, as shown *supra*, p. 6, § 514(c)(2) defines a "State" to include any instrumentality or agency thereof "which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans. . . ." The inference is compelling that, at a minimum, Congress had in mind that state action "which purports to regulate directly or indirectly, the terms and conditions of employee benefit plans" would be deemed to "relate to" such plans within the meaning of § 514(a).

Moreover, inasmuch as the legislative history cited above indicates that Congress intended to apply federal preemption in "its broadest sense", the phrase "relate to" must also be given a broad, rather than a constricted, interpretation. As Senator Javits asserted in Senate debate, states are barred from directly or indirectly regulating "the form and content" of a benefit plan.[5]

It follows that state statutes, such as the New York HRL, which require employee medical and disability plans to pay pregnancy benefits, or any other additional benefits for that matter, plainly "relate to" such plans. These statutes quite literally set "terms and conditions" of the plans and necessarily regulate at least plan content if not plan form as well. As the Seventh Circuit concluded in *Bucyrus-Erie Co. v.*

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[5] Senator Javits was responding to a question put to him as "a leader in this legislation" by Senator Taft as to whether "section 514 of the act seek[s] to preempt State bar associations from adopting ethical rules or guidelines generally and/or from disciplining its members." ERISA Leg. Hist., Vol. III at 4789. The answer of Senator Javits, insofar as pertinent here, was:

> Since the plans subject to Federal supervision would include plans providing prepaid legal services, it is intended that State regulation—but not bar association ethical rules, guidelines or disciplinary actions—in regard to such plans be preempted. But the State, directly or indirectly through the bar, is preempted from regulating the form and content of a legal service plan, for example, open versus closed panels, in the guise of disciplinary or ethical rules or proceedings.
>
> [*Ibid.*, and see also ERISA Leg. Hist. Vol. III at 4746 (remarks of Senator Williams).]

Dept. of Industry, Labor and Human Relations of the State of Wisconsin, 599 F.2d 205, 209-210 (1979), *cert. denied*, 444 U.S. 1031 (1980), a position to the contrary cannot be sustained because "the legislative history precludes so narrow a reading of the term 'relate.'" *Accord*: *Pervel Industries, Inc. v. Connecticut Comm'n on Human Rights*, *supra*; *Westinghouse Electric Corp. v. State of Maryland Comm'n on Human Relations*, 520 F. Supp. 539, 541 (D. Md. 1981).

It is by no means surprising that Congress opted in ERISA for the "broadest" federal preemption and for treating state civil rights laws which relate to benefit plans in the same manner as other state efforts to regulate the terms and conditions of such plans. ERISA, described by this Court as a "comprehensive and reticulated statute",[6] is the product of what Senator Javits called the "emergence of a comprehensive and pervasive Federal interest . . . in the field of private employee benefit programs" (*supra*, p. 9). In particular, as expressed by Senators Javits and Williams and Representative Dent (*supra*, pp. 8-11), Congress was concerned that, absent a broad preemption provision, there would be "endless litigation over the validity of State action that might impinge on Federal regulation", that employee benefit plans would be subjected to "conflicting and inconsistent State and local regulation", and that interstate plans could not maintain uniformity and equity among participants. There is an additional concern which,

[6] *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981); *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980).

though not as clearly articulated in ERISA's legislative history, was nonetheless recognized by this Court last term in *Alessi, supra*, 451 U.S. at 525-26: *i.e.*, the federal interest in precluding state interference with labor-management negotiations.[7]

State civil rights legislation which "relate[s] to" employee benefit plans raises all of the foregoing concerns. A wide variety of terms and conditions could be imposed on benefit plans as part of an expansive state effort to eliminate discrimination on the basis of sex, race, religious preference, or national origin. Requiring benefit plans to provide childcare, abortion, and various forms of educational assistance could all

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[7] In *Alessi* the Court stated: "As a subject of collective bargaining, pension terms themselves become expressions of federal law, requiring pre-emption of intrusive state law." 451 U.S. at 526. The same can be said with equal validity about the terms of *any* collectively bargained employee benefit plan. The national labor policy of free collective bargaining is that employers and unions are to have wide latitude in establishing terms and conditions of employment. *H.K. Porter Co. v. N.L.R.B.*, 397 U.S. 99, 105-108 (1970); *N.L.R.B. v. Insurance Agents*, 361 U.S. 477, 488-491 (1960). That latitude is necessarily circumscribed by the extent to which states are permitted to prescribe plan benefits or otherwise to increase plan costs by imposing additional administrative burdens. As a practical matter, employers frequently establish some ceiling on what they are willing to pay or can afford for labor costs. Where a part of those costs is allocated by state regulation to pay for benefits which are legislated, that much less is left to pay for benefits to which the parties to collective bargaining may assign a higher priority. Furthermore, insofar as a union and an employer may strive for a uniform agreement covering employees in several states, legislation in one of those states may in fact impact on employees in other states; but the benefits the employees in those other states receive because considerations of uniformity prevail may not be the benefits they most want or most need.

be justified by a civil rights rationale. So, for that matter, could a state prohibition against benefit plans paying for abortions on the ground that such a prohibition is necessary to protect the life of the unborn. Likewise, the standards for eligibility for participation in pension plans, vesting, and portability can be viewed as a civil rights issue. In fact, as the legislative history of ERISA indicates, some of these pension standards were so viewed. ERISA Leg. Hist., Vol. II at 3475-3476, 3496-3497 (remarks of Congresswoman Schroeder), Vol. III at 3508-3509 (remarks of Congresswoman Abzug).

If all that is necessary to nullify the ERISA preemption requirement is for a state to enact benefit regulation under the guise of civil rights legislation, the inventiveness and ingenuity of state and local legislators and their political constituencies will render § 514(a) largely meaningless. On the other hand, if distinctions are to be drawn on the basis of whether state regulation is or is not a "genuine" civil rights statute or whether it goes to the heart of subjects covered by ERISA, then we will be in the quagmire of endless litigation which Congress intended to avoid. In either event, plan uniformity will be difficult to achieve, plans will be subject to the possibility of conflicting and multiple state regulation, and the latitude for collective bargaining over plan terms and conditions will surely be diminished.

B. State Civil Rights Laws Which Relate To Benefit Plans Are Not Expressly Or Impliedly Exempted From Preemption By § 514(d)

It is argued that state civil rights laws, such as the New York HRL, are saved from preemption under ERISA § 514(a) by ERISA § 514(d). That argument, however, is unsupported by statutory language,

is undercut by ERISA's legislative history, and cannot fairly be justified on policy grounds.

Section 514(d) provides:

> Nothing in this title [title I of ERISA] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b)) or any rule or regulation issued under any such law.

It is obvious that the foregoing protects federal law, not state law, from preemption or impairment by ERISA. And it is equally obvious that state civil rights statutes are not federal laws, but state laws. Nor does the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, somehow convert state civil rights statutes into federal law or otherwise preserve such statutes from preemption by federal laws other than the Civil Rights Act itself. Thus, 42 U.S.C. § 2000e-7 states only that "Nothing in this title. . ."—meaning Title VII—shall be deemed to impair state civil rights laws.[8] So also, 42 U.S.C. § 2000h-4 refers only to the possible effect on state laws of "any title in this Act" or of "any provision of this Act", meaning the Civil Rights Act of 1964 but not any other federal act or provision of federal law.[9] As Judge Newman suc-

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[8] 42 U.S.C. § 2000e-7 provides:

> Nothing in this title [VII] shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

[9] 42 U.S.C. § 2000h-4 provides:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to

cinctly put it in *Pervel Industries v. State of Conn. Comm'n on Human Rights, supra*, 468 F. Supp. at 493, the Civil Rights Act of 1964 "did not create new authority for state anti-discrimination laws; it simply left them where they were before the enactment of Title VII."

The problem of preventing discrimination in benefit plans was specifically addressed in debate in the House and the Senate on earlier versions of ERISA. The solution to the problem was clearly perceived to be existing federal anti-discrimination legislation, vigorously enforced and centrally administered by the federal EEOC. Thus, in the Senate the following exchange occurred when S. 4 and S. 1179 were under consideration: [10]

> Mr. MONDALE. Mr. President, for some months I have been deeply concerned with the need to insure that pension benefits are made available on a nondiscriminatory basis to all

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occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

[10] Private pension reform legislation was reported out as S. 4 on April 18, 1973 by the Senate Labor and Public Welfare Committee and as S. 1179 on August 23, 1973 by the Senate Finance Committee. A compromise bill was worked out by the two committees and, after the adoption of several amendments, passed 93-0. Its text was incorporated in H.R. 4200, a minor House-passed bill dealing with servicemen's survivor annuity benefits, and thereafter became the Senate bill considered by the Conference Committee, which ultimatly agreed on the substitute bill enacted as ERISA. ERISA Leg. Hist., Vol. III at 4251.

those who have earned them regardless of race, color, national origin, religion or sex.

I had intended at this time to raise my amendment incorporating nondiscrimination based on race, color, national origin, religion or sex into the basic requirements of the pending bill.

However, I understand that the distinguished Senator from New Jersey (Mr. Williams) is concerned that this approach runs counter to our actions last year in further consolidating equal employment jurisdiction in the Equal Employment Opportunity Commission.

Mr. WILLIAMS. The Senator is correct. Although I fully share your concern for full enforcement of nondiscrimination requirements affecting pension and profit-sharing plans, I believe that the thrust toward centralized administration of nondiscrimination in employment must be maintained. And I believe this can be done by the Equal Employment Opportunity Commission under terms of existing law.

Mr. MONDALE. Does the Senator agree that discrimination based on race, color, national origin, religion, or sex affecting participation in pension or profit-sharing plans, is presently prohibited under section 703(a) of the Equal Employment Opportunity Act? . . .

Mr. WILLIAMS. I agree with the Senator's reading of the statute and I understand that the courts are following this view. [Citations omitted]

Again, I share the concerns of the distinguished Senator from Minnesota that the EEOC must view discrimination in pension plans as among the most serious forms of employment discrimination.

Mr. MONDALE. Mr. President, the distinguished Senator from New Jersey . . . is the prin-

> cipal architect of the Equal Employment Opportunity Act and of the pending bill. I deeply appreciate his judgment and his assistance.
>
> In light of the Senator's views, and with the understanding that nondiscrimination in pension and profit-sharing plans is fully required under the Equal Employment Opportunity Act, I will not propose my amendment at this time.
>
> [ERISA Leg. Hist., Vol. II at 1862-1863]

A virtually identical exchange took place on the floor of the House between Representative Abzug and Representative Dent. ERISA Leg. Hist., Vol. III at 3518-3519. The nature of the two exchanges, and the fact that they are so nearly identical, renders inescapable the conclusion that Congress conscientiously considered the matter of discrimination and made a deliberate decision that it could best be eliminated from benefit plans by application of existing federal law rather than by state action which imposes new and different obligations.

It is asserted nonetheless that state civil rights laws are such an integral part of the anti-discrimination effort contemplated by Title VII that preemption of such laws necessarily would impair the operation of Title VII. Whatever validity this argument might have with regard to federal preemption of state laws which make unlawful employment practices which are the same as those made unlawful by Title VII (42 U.S.C. §§ 2000e-2, 2000e-3), it has none where, as here, the issue is whether a state law which, during the relevant period, goes beyond Title VII and makes additional employment practices unlawful is preempted. ERISA's preemption of the latter would in

no way interfere with what this Court has only recently referred to as the "important role *in enforcing Title VII*" assigned to the states by Congress. *Kremer v. Chemical Construction Corp.*, 50 U.S.L.W. 4487, 4490 (May 17, 1982) (emphasis added). The "scheme of interrelated and complementary state and federal enforcement" provided for by 42 U.S.C. § 2000e-5, which "[i]n practice . . . has resulted in EEOC's development of a referral and deferral system", would remain unaffected by such preemption. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63-65 (1980). So also would the cooperative arrangements between the EEOC and state and local agencies envisioned by 42 U.S.C. § 2000e-8(b) "for the purpose of carrying out its [*i.e.*, the EEOC's] functions and duties under this subchapter [*i.e.*, Title VII] . . . ."

Nor is there any persuasive support for the proposition that the anti-discrimination policies embodied in Title VII cannot be vindicated unless states and local governing bodies are given free reign to proscribe conduct outside the scope of Title VII. Indeed, the prohibitions of Title VII are quite sweeping, and, thus, the real problem of assigning to the states a responsibility for effectuating a national civil rights policy was that "Members of Congress . . . felt the federal system should defer only to adequate state laws." *Kremer v. Chemical Construction Co.*, *supra*. In short, the concern was not that the states had to be encouraged to do more than Title VII, but rather to do as much. To be sure, as shown previously (*supra*, pp. 16-17), Congress did not intend that its enactment of comprehensive civil rights legislation be used as a shield to ward off further state efforts in this area, and it said so in 42 U.S.C. § 2000e-7. However, it is one thing to recognize that Title VII

itself does not bar such efforts. But it is quite another to conclude that Title VII affirmatively authorizes such state and local legislative efforts going beyond Title VII notwithstanding that they may contravene other important federal policies and, in particular, the policy of ERISA which encourages the development of uniform multi-state benefit plans free of costly, burdensome, and possibly conflicting state and local regulation. It would be astonishing if Congress were willing to relinquish federal authority in this manner, and we submit that nothing in Title VII requires that such a blank check be given to the states and local governing bodies.

IV. CONCLUSION

For all of the foregoing reasons, Amici ERIC and EEAC urge that the judgment of the court of appeals should be affirmed insofar as it held the New York HRL preempted by ERISA.

Respectfully submitted,

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No. 81-1578

In the Supreme Court of the United States

October Term, 1981

WERNER H. KRAMARSKY etc., et al.,
Appellants

v.

DELTA AIR LINES, INC., et al.,
Appellees

WERNER H. KRAMARSKY, etc.,
Appellant

v.

BURROUGHS CORPORATION,
Appellee

WERNER H. KRAMARSKY, etc., et al.,
Appellants

v.

METROPOLITAN LIFE INSURANCE COMPANY,
Appellee

On Appeal From the United States Court of Appeals for the Second Circuit.

BRIEF OF COMMONWEALTHS OF PENNSYLVANIA AND MASSACHUSETTS AND SIXTEEN STATES AS AMICI CURIAE

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TABLE OF CONTENTS

	PAGE
Interest of the Amici	3
Summary of Argument	4
Argument	5
Conclusion	19

TABLE OF CITATIONS

CASES:

Alessi v. Raybestos-Manhatten, Inc., 451 U.S. 504 (1981) 12, 13, 14, 19

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 8

Bucyrus-Erie Co. v. Dept. of Industry, Labor and Human Relations, 559 F.2d 205, cert. denied 444 U.S. 1031 (1980) 14

Holy Trinity Church v. United States, 143 U.S. 457 (1892) 18

Kramarsky v. Delta Airlines, 666 F.2d 23 ..... 12, 19

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980) 8

Steelworkers v. Weber, 443 U.S. 193 (1979) 18

STATUTES:

Age Discrimination in Employment Act, P.L. 90-202, 81 Stat. 602:

29 U.S.C.A. §621 et seq. 9, 10

29 U.S.C. §630(b) 13
29 U.S.C. §633 ..... 10, 14
29 U.S.C. §634(c) 17
Alaska State Laws Against Discrimination, Title 18, Sec. 18.80-220 16
California Fair Emp. Practices and Housing Act, Title 2 Govt. Code Sec. 12960 18
Employee Retirement Income Security Act of 1974:
29 U.S.C. §791 15
29 U.S.C. §793 15
29 U.S.C. §794 ..... 15, 16
29 U.S.C. §1003 13
29 U.S.C. §1144(a) 3
29 U.S.C. §1144(d) 14
Enacted Laws, Ch. 8, Ex. Sess. 1955, Wash. Rev. Code Ch. 48.42 12
Federal Civil Rights Act of 1964, 78 Stat. 241 (1964):
Title VII, Sec. 708, 42 U.S.C.A. 2000e-1 .... 7, 14
Title VII, Sec. 709(b) 11
Title VII, 42 U.S.C.A. §2000e 6, 7, 8
Title VII, 42 U.S.C. 2000e(b) 13
42 U.S.C.A. 2000e-5(d) 7, 14
Title VII, 42 U.S.C. §2000e-5(f) 17
Human Rights Law, Cons. Laws of N.Y. Exec. Law, Sec. 34-06.1-06 18
North Dakota Fair Emp. Practices Law, Sec. 34-06, 1-06 18

P.L. 92-261, 86 Stat. 103 9

P.L. 93-259, 88 Stat. 55, enacted April 8, 1974 ... 10

P.L. 95-256, 92 Stat. 189, enacted April 6, 1978 .. 10

P.L. 95-955 9

1962 Pa. Human Rel. Comm'n Ann. Rep. 25, at pp. 11, 20 6

Rhode Island Fair Emp. Practices Act, Title 28 General Laws of R.I., Secs. 25-5-18, 34-37-5(3) .. 18

Wisconsin Fair Employment Act, Wis. Stat. §§111.31-111.37 .....14, 16

OTHER AUTHORITIES:

Committee on Human Resources, Report to Senate, Senate House Report No. 95-493 .....10, 11

110 Cong. Rec. 1521 (1974) 6

110 Cong. Rec. 6548 (1964) 7

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Rule 2.7 (a), Rules and Regs. Idaho Commission on Human Rights 18

Sol Rabkin, "Enforcement of Laws Against Discrimination in Employment," Vol. 14, Buffalo Law Journal, pp. 100-113 (Buffalo, New York 1965) at p. 101 5

The Federal Civil Rights Enforcement Effort—1977, To Eliminate Employment Discrimination: A Sequel, a Report of the United States Commission on Civil Rights, December 1977 at 237 .. 11

Werner Pfennigstorf and Spencer L. Kimball, "Employee Legal Service Plans: Conflicts Between Federal and State Regulations", 1976 American Bar Foundation Research Journal, pp. 787-853 (1975 American Bar Foundation, 853) .. 12

No. 81-1578

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

WERNER H. KRAMARSKY etc., et al.,
Appellants

v.

DELTA AIR LINES, INC., et al.,
Appellees

WERNER H. KRAMARSKY, etc.,
Appellant

v.

BURROUGHS CORPORATION,
Appellee

WERNER H. KRAMARSKY, etc., et al.,
Appellants

v.

METROPOLITAN LIFE INSURANCE COMPANY,
Appellee

On Appeal From the United States Court of Appeals for the Second Circuit

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The Commonwealths of Pennsylvania and Massachusetts and the States of Arizona, Colorado, Connecticut, Florida, Hawaii, Iowa, Louisiana, Maine, Maryland, Michi-

gan, Minnesota, Missouri, Vermont, Washington, Wisconsin and Wyoming file this brief as Amici Curiae pursuant to Rule 42 (4) of the Rules of this Court.

INTEREST OF THE AMICI

The Commonwealths of Pennsylvania and Massachusetts and the States of Arizona, Colorado, Connecticut, Florida, Hawaii, Iowa, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Vermont, Washington, Wisconsin and Wyoming are eighteen of forty-seven states which have exercised their police powers so as to prohibit one or more kinds of employment discrimination by employers and labor organizations in the terms and provisions of employee benefit plans.

Many of the discriminatory employee benefit practices prohibited by Amici are also prohibited by federal law. However, Amici have in the past and desire to continue in the future to use their own state administrative and judicial procedures to regulate and rectify such practices. In addition, Amici have undertaken and desire to continue to provide greater protection to workers within their boundaries than that provided by federal law, by extending the coverage of their state fair employment practices statutes to employers not covered by the federal laws, and by proscribing additional arbitrary, capricious and invidious employment practices by employers and labor organizations.

The opinion below held that a state statute which prohibits employers from discriminating against pregnancy in the terms of their employee benefits plans is preempted by Section 514(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1144(a). If the lower court decision is upheld it will have a significant impact on Amici by depriving them of their traditional right to regulate discrimination of any kind in terms, conditions or privileges of employment embodied in ERISA-covered plans.

SUMMARY OF ARGUMENT

Discrimination by employers and labor organizations is an area of traditional state concern. Many states have been pioneers in the protection of workers from invidious and capricious employment practices, having taken action well in advance of any efforts at the federal level to regulate such conduct.

Federal fair employment legislation and the court decisions which interpreted that legislation have carefully preserved the right of the states to regulate all areas of employment discrimination including those which affect employee benefit plans. If ERISA's preemptive language were held to deprive the states of jurisdiction over a large number of discriminatory employee benefits practices within their boundaries, it would undermine the federalist scheme for protection of workers which Congress has scrupulously developed.

The federal concern for uniformity in the regulation of pension plans would not be thwarted were this Court to decide to allow states to continue to regulate discriminatory employee benefits practices.

ARGUMENT

State regulation of discriminatory employment practices significantly predates federal legislation. The first state fair employment statute was passed by New York in 1945, Law Against Discrimination, N.Y. Executive Law, art. 15.[1] By 1964, the year Title VII was enacted, 25 states had passed legislation prohibiting discrimination in employment on the basis of race, color, religion and/or ethnic origin.[2]

While the effectiveness of state enforcement varied, some states were quite active in challenging employment discrimination in their jurisdiction. Between 1945 and 1960, the New York State Commission processesd about 6,000 complaints filed with it by persons alleging discriminatory employment practices.[3] Between 1956 and 1963 the Pennsylvania Human Relations Commission processed 1,307 complaints of employment discrimination, finding probable cause in 565 cases. It was able to reach a satis-

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[1] Sol Rabkin, "Enforcement of Laws Against Discrimination in Employment," Vol. 14 Buffalo Law Journal, pp. 100-113 (Buffalo, New York 1965) at p. 101.

[2] Herbert Hill, "Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis With Recommendations," Vol. 14 Buffalo Law Journal, pp. 22-69 (Buffalo, New York 1965) at pp. 32-33.

[3] Joseph P. Witherspoon, "Civil Rights Policy In the Federal System: Proposals for a Better Use of the Administrative Process," Vol. 74 Yale Law Journal, pp. 1170-1246 (New Haven 1964-1965) at 1188.

factory adjustment through conciliation in 564 cases or 43 percent of its case load.[4]

These efforts by the states did not go unnoticed by Congress when it was considering the passage of Title VII of the Federal Civil Rights Act of 1964, 78 Stat. 241 (1964), 42 U.S.C.A. §2000e (1964).

For example, Congressman Emmanuel Celler of New York who was Democratic Chairman of the House Committee on the Judiciary which reported the bill, stated in the House debate

> To the maximum extent possible Title VII provides for the utilization of existing State fair employment laws and procedures. Existing State laws will remain in effect except as they conflict directly with Federal law. Through cooperative efforts with State and local agencies, Title VII envisions an effective and harmonious mobilization of Federal, State and local authorities in attacking this national problem.
>
> Approximately half of the States today have laws prohibiting discrimination in employment. Title VII would extend this protection throughout 50 states.[5]

Similarly Senator Hubert Humphrey of Minnesota stated in his introduction of the bill into the Senate:

> There is no novelty in fair employment practices legislation. Some 25 States already have such laws and they have, on the whole, worked well and caused no meaningful disruption of business or private rights. The coverage of such laws is generally as broad or

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[4] 1962 Pa. Human Rel. Comm'n Ann. Rep. 25, at pp. 11, 20, cited in Witherspoon, supra at 1182.

[5] 110 Cong. Rec. 1521 (1974)

> broader than the coverage of Title VII. Except regards discrimination in employment on grounds of sex, which is, I am informed, presently covered by the FEPC laws of only two states, Title VII will not impose any substantial new obligations on employers or unions in those states which already have effective State fair employment practice laws. . .[6]

As enacted, Title VII of the Civil Rights Act of 1964, specifically preserves the rights of the states to act in the area of employment discrimination. Sec. 708 states:

> Nothing in this Title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than would be unlawful employment practice under this title.

42 U.S.C. §2000e-7.

In addition, Title VII requires that when a charge is filed in a jurisdiction with an applicable FEP law, that the Equal Employment Opportunity Commission ("EEOC") defer the charge to the applicable state or local authority for a period of at least sixty days, 42 U.S.C. 2000e-5(d).

The protection of state law and deferral provisions of Title VII represented a compromise for certain advocates of the Civil Rights Act. As Senator Clark, one of the floor managers for the bill, stated in the Senate debates:

> The changes I most deplore are, first, the subordination of Federal power to the localities and the States in connection with the enforcement of equal

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[6] 110 Cong. Rec. 6548 (1964)

> job opportunity. The amendment deprives the Federal Fair Employment Practices Commission of any legal authority to enforce orders through the Federal courts. Instead, the individual who complains that he has been denied equal job opportunity is relegated either to a proceeding in the first instance under a State statute, if a State has a fair employment practices statute, or, in the alternative, to a local ordinance. . .[7]

This Court has recognized in the legislative history of Title VII

> a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 (1974). More recently, this Court stated

> It is clear from this scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination. Initial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief.

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 65 (1980).

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[7] 110 Cong. Rec. 12598 (1964)

In the eighteen years since its passage, Congress has only twice amended Title VII. In 1972 Congress revised the definition of persons covered by the Act so as to include governments, governmental agencies and political subdivisions. It also expanded Title VII's jurisdiction to cover employers of fifteen or more employees. P.L. 92-261, 86 Stat. 103. Congress left intact the statute's scheme for deference and deferral to state FEP laws.

In 1978, Congress amended Title VII, this time to specifically ban discrimination on the basis of pregnancy, childbirth or related medical conditions, P.L. 95-955. Here again, Congress did not consider any disruption of the statute's federal-state enforcement scheme. More importantly, however, is that Congress, as it did in 1964, considered and relied on the experience of employers in states which already prohibited pregnancy related discrimination in its deliberations and decision to pass the proposed amendments.

The Report to the Senate of the Committee on Human Resources, 95th Cong., 1st Sess., Senate Report No. 95-331, p. 10, minimized the impact of the legislation on the basis that "[t]wenty-five (25) states currently interpret their own fair employment practices laws to prohibit sex discrimination based on pregnancy and childbirth." Similarly, the House Committee on Education in its Report, 95th Cong., 2d Sess., House Report No. 95-948, p. 9, predicted little or no economic impact from the amendment because "many employers are *already* under a State law obligation to provide benefits to pregnant disabled workers."

The history of the federal Age Discrimination in Employment Act ("ADEA"), P.L. 90-202, 81 Stat. 602, 29

U.S.C. §621 et seq. reflects the same congressional solicitude for state FEP laws as that found under Title VII. As enacted, Section 14 of the ADEA provides:

> (a) Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action.
>
> (b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice no suit may be brought under section 7 of this Act before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated. . .

29 U.S.C. §633.

Like Title VII, the ADEA has been amended twice, without any change in its scheme for joint federal and state regulation of employment practices which discriminate on account of age.[8] That scheme was reaffirmed by the Committee on Human Resources in its Report to the Senate on the 1977 amendments to the ADEA, Senate House Report No. 95-493, which stated

> When Congress originally enacted the ADEA it intended that the States should retain the power to

[8] P.L. 93-259, 88 Stat. 55, enacted April 8, 1974; P.L. 95-256, 92 Stat. 189, enacted April 6, 1978.

act in the area of age discrimination in employment. At that time then Secretary of Labor Wirtz specifically said that the original Administration proposal was designed to preserve and encourage State legislation for coping with [the age discrimination in employment] problem (letter to the Speaker of the House reprinted in 113 Congressional Record 1377, January 24, 1967). The approach in Section 14 of the ADEA is in accord with the general principle recognized by the Supreme Court that in the field of employment practices States possess broad authority under their police powers. Accordingly, States are free to pass their own age discrimination laws. Most States have done so, and in many instances their provisions do differ from the ADEA in some respects. For example, while the ADEA does not protect individuals less than 40 years old, some State laws (Michigan, New York and Oregon) protect individuals down to the age of 18. Likewise, while the ADEA does not apply to any employer having fewer than 20 employees, some State laws have no such restriction.

Congress has also manifested its continuing support for the joint federal-state enforcement scheme through the exercise of its spending power. In fiscal year 1975, EEOC provided $3.5 million to State and local agencies pursuant to Section 709(b) of Title VII.[9] By 1978 EEOC's appropriation for funding state and local agencies was $10.4 million.[10]

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[9] The Federal Civil Rights Enforcement Effort—1977, To Eliminate Employment Discrimination: A Sequel, a Report of the United States Commission on Civil Rights, December 1977 at 237.

[10] Id., at 240.

As discussed above, Title VII and ADEA both manifest a clear congressional intent to protect and preserve the right of the states to proscribe discriminatory employment practices within their boundaries. It is against that carefully designed and explicitly expressed federal scheme for joint federal and state regulation of discriminatory employment practices that the decision of the court below must be measured.

The court below relied on this Court's decision in *Alessi v. Raybestos-Manhatten, Inc.*, 451 U.S. 504 (1981), for its determination that ERISA preempted provisions of state FEP legislation which related to employee benefit plans. *Kramarsky v. Delta Airlines,* 666 F.2d at 23-25. In *Alessi,* this Court found that ERISA preempted a New Jersey statute which prohibited integration of pension benefits with workers' compensation benefits, 451 U.S. at 514-517. However, there are several distinct differences between the state statute at issue in *Alessi* and state FEP laws.

Unlike the history of state FEP legislation, the first express state regulation of employee pension and welfare plans came only in 1955, Ch. 8, Enacted Laws Ex. Sess. 1955, creating Wash. Rev. Code Ch. 48.42. By the time of passage of ERISA fewer than ten states had attempted to legislate pension and welfare plan reform. Congress was left with no alternative but to do the job itself because of "the uninterested attitude of the vast majority of the states."[11]

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[11] Werner Pfennigstorf and Spencer L. Kimball, "Employee Legal Service Plans: Conflicts Between Federal and State Regulation", 1976 American Bar Foundation Research Journal, pp. 787-853 (1975 American Bar Foundation), 853.

The New Jersey statute which was declared preempted in *Alessi* directly interfered with a method of calculating pension benefits, integration, which this Court found that Congress had intended to preserve, 451 U.S. at 514-517. Methods of calculating and paying pension benefits are explicitly regulated by ERISA. Discriminatory employment practices are not. The application of ERISA to discriminatory employee benefits practices creates a problem of a regulatory void which did not arise in *Alessi.*

Title VII does not apply to employers which have less than fifteen employees, 42 U.S.C. 2000e(b). The ADEA does not apply to employers which have less than twenty employees, 29 U.S.C. §630(b). Thirty-three (33) states have passed FEP laws which prohibit discrimination on account of race, sex, age and or some other reason proscribed by federal law for employees of smaller employers.[12] In contrast to Title VII and the ADEA, ERISA does not use a minimum number of employees standard to determine its applicability. Instead, its jurisdiction rests solely on whether the entity establishing the plan affects commerce, 29 U.S.C. §1003.

Because of this difference in definitions, ERISA preemption of state discrimination statutes will allow employers engaged in industries affecting commerce but with less than twenty employees to discriminate on account of

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[12] Alaska, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, Oregon, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, Wyoming.

age and will allow employers with less than fifteen employees to discriminate on account of race, color, religion, sex and national origin in the terms of their employee benefit plans.

Alessi also did not deal with a state statute expressly protected by federal statutes. Title VII and the ADEA both specifically preserve state FEP laws, 42 U.S.C. §§2000e-5, 2000e-7, 29 U.S.C. §633. The Seventh Circuit found that ERISA did not preempt the prohibition in the Wisconsin Fair Employment Act, Wis. Stat. §§111.31-111.37, of discrimination in terms, conditions or privileges of employment because

> the preemption of State fair employment laws would operate to "alter, amend, modify, invalidate, impair or supersede" another federal "law, rule or regulation" in contravention of an express exception in section 514 of ERISA. 29 U.S.C. §1144(d).

Bucyrus-Erie Co. v. Dept. of Industry, Labor and Human Relations, 559 F.2d 205, 210 (7th Cir. 1979), cert. denied 444 U.S. 1031 (1980).

Some states such as Arizona have taken great pains to draft their state laws to mirror federal employment discrimination legislation in order to exercise their right to deferral under Title VII and the ADEA. Despite their best efforts, these states will lose that right with respect to ERISA-covered employee benefits practices. There was no similar impairment of a joint federal-state enforcement scheme in *Alessi.*

The decision below abolishes the right of the states to exercise jurisdiction over any discriminatory employment practice which is encompassed in an ERISA-covered

employee benefit plan. The effect of the decision is to drastically reduce the substantive and procedural coverage of state FEP laws, thereby depriving thousands of workers of their right to challenge certain discriminatory practices and forcing thousands of others to resort to often less accessible and more cumbersome federal enforcement procedures.

Many states have exercised their right to prohibit arbitrary and unjustifiable employment practices other than those currently made unlawful by Title VII and the ADEA.[13] Most prevalent among these other practices prohibited by state law is discrimination against handicapped workers.

Thirty-six (36) states have laws which in one form or another regulate such discrimination.[14]

Although Congress has evinced a concern for discrimination against handicapped workers it has only acted to prohibit such treatment by the federal government, 29 U.S.C. §791, federal contractors, 29 U.S.C. §793, and

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[13] Alaska, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Ohio, Oklahoma, Rhode Island, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Pennsylvania.

[14] Alaska, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin.

those accepting federal monies, 29 U.S.C. §794. One unintended effect of ERISA preemption would be to deprive hundreds of thousands of handicapped persons of any legal protection from employers who discriminate against them in terms of their employee benefit plans.

Seventeen states prohibit discrimination based on marital status.[15] The decision below clearly invalidates such state laws insofar as they attempt to regulate ERISA-covered employee benefits plans. This means, of course, that states are stripped of their ability to regulate insidious practices such as that engaged in by some employers of discriminating against persons in various benefit plans on the basis of their marital status. It also means that the federal government will be deprived of the benefit of the experience in the states upon which it has relied in the past should it choose to consider such federal fair employment legislation in the future.

Other state laws proscribe discrimination for other reasons such as parenthood, Alaska State Laws Against Discrimination, Title 18, Sec. 18.80-220, and sexual orientation, Wisconsin Fair Employment Act, Sec. 111.36(1) (d) Wis. Stats. Where such discrimination is incorporated into the terms of an ERISA-covered employee benefit plan, the decision below would eliminate the right of states to regulate the discriminatory treatment but does not leave any federal protection in its place.

There are many other consequences to states and their citizens which would result from a decision that ERISA

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[15] Alaska, California, Connecticut, Florida, Hawaii, Illinois, Maryland, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, Oregon, Washington, Wisconsin.

preempts state FEP laws and which appear inconsistent with congressional intent.

One purpose of the express savings language of both Title VII and the ADEA was to allow persons to invoke the more accessible administrative and judicial procedures available to them in their states, and not force them to seek redress through remote federal procedures. It was recognized that the Equal Employment Opportunity Commission ("EEOC") could not handle all of the country's employment discrimination cases. In fact by October, 1967, the EEOC had only twelve field offices, located in Atlanta, Chicago, Cleveland, Los Angeles, New Orleans, New York, San Francisco, Albuquerque, Kansas City (Mo.), Austin, Washington, D.C. and Birmingham.[16] Even today the EEOC does not maintain offices in a number of states[17] and in those states where it does, it often maintains fewer offices than those operated by the state FEP authorities.

Title VII and the ADEA also both apparently require that private suits brought under them be filed in federal district court, 42 U.S.C. §2000e-5(f), 29 U.S.C. §634(c). If ERISA is interpreted to require exclusive federal jurisdiction of discriminatory employee benefits practices, it will force those wishing to complain of such practices to overcome all the problems associated with greater geographical distance. In addition, it will force them to deal with a more remote governmental body which is less responsive to their needs and concerns. Those aggrieved

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[16] Richard P. Nathan, Jobs and Civil Rights Prepared for the United States Commission on Civil Rights by the Brookings Institution, Washington, D.C. Clearinghouse Publication No. 16, April 1979, pp. 40-41.

[17] FEP Manual, BNA Labor Relations, Vol. 8, Sec. 431.549.

persons unfamiliar with federal law and procedures who rely on their knowledge of state laws and procedures may find their rights limited or even extinguished because of, for example, longer state statutes of limitations.[18]

Abolition of state jurisdiction over ERISA-covered employee benefits plans deprives state authorities of their ability to accept and process complaints challenging some of the most significant forms of discrimination practices by employers today, and it eliminates their ability to enjoin such practices. The emasculation of state jurisdiction under these circumstances cannot but undermine the position and prestige of state FEP agencies in the eyes of both complaining parties and discriminating employers.

ERISA's legislative history does not contain one word discussing the annulment of state FEP legislation in such areas as sex, handicap and marital status discrimination.

This Court has stated in another context that "a thing may be within the letter of the statute, and yet not within the statute because not within its spirit, nor within the intention of its makers." *Holy Trinity Church v. United States,* 143 U.S. 457, 459 (1892), cited with approval in *Steelworkers v. Weber,* 443 U.S. 193, 201 (1979). The Court below looked only at the "plain language" of §514 for its conclusion that "[t]he only relevant state laws that survive this preemption provision are those relating to

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[18] California Fair Emp. Practices and Housing Act, Title 2 Govt. Code Sec. 12960 (one year); Rule 2.7(a), Rules and Regs. Idaho Commission on Human Rights (one year); Human Rights Law, Cons. Laws of N.Y. Exec. Law, Sec. 297-5 (one year), North Dakota Fair Emp. Practices Law, Sec. 34-06, 1-06 (3 years); Rhode Island Fair Emp. Practices Act, Title 28 General Laws of R.I., Secs. 28-5-18, 34-37-5(3) (less than 1 year).

plans that are themselves exempt from ERISA's scope," 666 F.2d at 25. However, this Court, in *Alessi,* declined to adopt such a "plain language" rule. Instead, it found the particualr statute at issue "an impermissible intrusion on the federal regulatory scheme." 451 U.S. at 525.

CONCLUSION

For the reasons stated above, the decisions below should be reversed.

Respectfully submitted,

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for the Second Circuit

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CONTENTS

PAGE

Interest of Westinghouse Electric Corporation 2

Summary of Argument 3

Argument

I. Section 514 of ERISA Preempts Application of State Fair Employment Practice Laws, Including The New York Human Rights Law, To Disability Benefits Plans Covered By ERISA 7

II. The Fact That Title VII Of The Civil Rights Act Did Not Preempt the HRL Does Not Mean That ERISA Did Not Preempt Application of the HRL To ERISA-Covered Employee Benefit Plans 16

Conclusion 29

TABLE OF CITATIONS

CASES

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981). 5, 12, 13, 14, 19

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 23

Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980) 28

Brown v. General Services Administration, 425 U.S. 820 (1976) 23

Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942). 18, 19

First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946) 20

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 13

Jones v. Rath Packing Co., 430 U.S. 519 (1977) 8

Kremer v. Chemical Construction Corp., 50 U.S.L.W. 4487 (U.S. 1982) 21, 24

PAGE

Love v. Pullman Co., 404 U.S. 522 (1972) 22, 24

Murphy v. Heppenstall Co., 635 F.2d 233 (3d Cir. 1980), *cert. denied*, 71 L.Ed.2d 293 (1982) 28

Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1980) 8, 16

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980) 22, 23, 24

Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) 26

Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384 (1951) 26

Wayne Chemical, Inc. v. Columbus Agency Service Corp., 426 F. Supp. 316 (N.D. Ind. 1977), *modified and aff'd on other grounds*, 567 F.2d 692 (7th Cir. 1977) 28

FEDERAL STATUTES AND REGULATIONS

Act of March 9, 1945 (McCarran-Ferguson) § 2(b), 15 U.S.C. § 1012(b) 20

Act of October 31, 1978, Pub. L. No. 95-555, 92 Stat. 2076 27

Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 ..... 4, 25, 26

Assimilative Crimes Act, 18 U.S.C. § 13 21

Bank Holding Company Act of 1956 § 7, 12 U.S.C. § 1846 20

Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e *et seq.* ..... passim

Section 705(g)(1), 42 U.S.C. § 2000e-4(g)(1) 22
Section 706, 42 U.S.C. § 2000e-5 21
Section 706(b), 42 U.S.C. § 2000e-5(b) 22
Section 706(c), 42 U.S.C. § 2000e-5(c) 22, 26
Section 708, 42 U.S.C. § 2000e-7 ..... 17, 21
Section 709(b), 42 U.S.C. § 2000e-8(b) 22
Section 709(d), 42 U.S.C. § 2000e-8(d) 22
Section 717, 42 U.S.C. § 2000e-16 23

Clean Air Act § 110, 42 U.S.C. § 7410 21

PAGE

Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 ..... passim

Section 3(1), 29 U.S.C. § 1002(1) 7
Section 3(3), 29 U.S.C. § 1002(3) 7, 14
Section 4(b)(3), 29 U.S.C. § 1003(b)(3) 19
Section 202(a)(1)(A), 29 U.S.C. § 1052(a)(1)(A) 3
Section 203(b)(1), 29 U.S.C. § 1053(b)(1) 3
Section 514(a), 29 U.S.C. § 1144(a) ..... passim
Section 514(b), 29 U.S.C. § 1144(b) 8
Section 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) 7
Section 514(b)(4), 29 U.S.C. § 1144(b)(4) 7, 14
Section 514(d), 29 U.S.C. § 1144(d) 5, 17

Federal Reserve Act § 13, 12 U.S.C. § 330 20

Federal Tort Claims Act, 18 U.S.C. § 1346(b) 21

Securities Act of 1933 § 18, 15 U.S.C. § 77r. 20

Securities Exchange Act of 1934 § 28(a), 15 U.S.C. § 78bb(a) 20

29 C.F.R. § 1601.74 (1981) 22

STATE STATUTES

Cal. Gov't. Code § 12941 (West 1980 & Supp. 1982) 4
N.Y. Exec. Law § 296 (McKinney 1982) ..... passim
N.Y. Exec. Law § 296.3-a(g) (McKinney 1982) 4
N.Y. Work. Comp. Law § 204.1 (McKinney 1965) ... 3
Pa. Stat. Ann., tit. 43, §§ 951-963 (Purdon 1964 & Supp. 1965-81) 4

LEGISLATIVE HISTORY

110 Cong. Rec. 2727 (1964) 21
110 Cong. Rec. 2828 (1964) 21
119 Cong. Rec. 30409 (1973) 24
120 Cong. Rec. 4726 (1974) 24
120 Cong. Rec. 29197 (1974) 10
120 Cong. Rec. 29933 (1974) 11
120 Cong. Rec. 29942 (1974) 11
124 Cong. Rec. 8219 (1978) 26

PAGE

H. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974) 10
H. R. Rep. No. 553, 93d Cong., 1st Sess. (1973) 15
H.R. 2, 93d Cong., 1st Sess. § 114 (1973) 9
S.4, 93d Cong., 1st Sess. § 609 (1973) 9

OTHER

Subcommittee on Labor, Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974* (1976) 9

No. 81-1578

IN THE

Supreme Court of The United States

October Term, 1981

WERNER H. KRAMARSKY, etc., *et al.*,
Appellants

v.

DELTA AIR LINES, INC., *et al.*,
Appellees

WERNER H. KRAMARSKY, etc.,
Appellant

v.

BURROUGHS CORPORATION,
Appellee

WERNER H. KRAMARSKY, etc., *et al.*
Appellants

v.

METROPOLITAN LIFE INSURANCE COMPANY,
Appellee

On Appeal From the United States Court of Appeals
for the Second Circuit

BRIEF OF WESTINGHOUSE ELECTRIC CORPORATION AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF APPELLEES

This brief *amicus curiae* is filed by Westinghouse Electric Corporation with the consent of all parties, as provided for in Rule 36.2 of the Rules of this Court. Letters consenting to the filing of this brief have been filed with the Clerk of the Court.

INTEREST OF WESTINGHOUSE ELECTRIC CORPORATION

Westinghouse Electric Corporation ("Westinghouse") is a private employer with facilities located throughout the nation. Westinghouse is engaged in the manufacture of industrial electrical equipment, electronic equipment, electric motors, jet engines, as well as other electrical items and machinery.

Westinghouse provides various welfare benefit programs, including accident and sickness disability benefits, to its employees throughout the United States. Many of these employee welfare benefit plans are covered and regulated by the federal Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001-1461.

Westinghouse is currently the defendant in at least two civil lawsuits and various administrative proceedings presently pending in, among other jurisdictions, the Commonwealth of Pennsylvania and the State of Maryland in which a critical issue is whether §514(a) of ERISA, 29 U.S.C. §1144(a), preempts application of state fair employment practice laws to employee benefit plans covered by ERISA. This issue of federal preemption under ERISA is virtually identical to one of the issues presented in the appeals at bar.

SUMMARY OF ARGUMENT

The question presented in these appeals is whether §514 of ERISA preempts application of state fair employment practice laws to employee benefit plans covered by ERISA.[1]

It might be thought that the decision in this case will be almost entirely retrospective in its practical effect, given that Title VII today requires pregnancy to be treated as a disability, but that is not so. This case turns on the scope of § 514(a) of ERISA, which expressly "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" subject to ERISA. The extent to which this preemption provision applies to state fair employment laws is a vital issue of general application and is not limited to the matter of disability benefits for pregnancy. For example, the scope of ERISA's preemption provision will have great significance concerning the extent to which employee benefit plans can continue to draw distinctions based upon age. Under ERISA, pension plans may deny participation to an employee who has not yet attained the age of 25 and completed one year of service (29 U.S.C. § 1052 (a)(1)(A)). Such plans can also disregard service before the age of 22 for purposes of vesting (29 U.S.C. § 1053 (b)(1)). Those provisions are compatible with the fed-

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1. The state fair employment practice law involved in this case is the New York Human Rights Law, N.Y. Exec. Law § 296 (McKinney 1982) ("HRL"). A second issue presented for review by Appellants concerns whether § 514 of ERISA preempts the New York Disability Benefits Law, N.Y. Work. Comp. Law § 204.1 (McKinney 1965), which requires employers to provide certain minimum disability benefits to pregnant employees. *Amicus* Westinghouse does not address that issue.

eral age discrimination law,[2] but absent preemption, such provisions could be declared unlawful by states which have enacted age discrimination laws which do not contain the federal minimum age limit (forty years of age) for inclusion within the protected group.[3] Similarly, since various state age discrimination laws (such as, for example, those of California and Pennsylvania[4]) contain no exception for bona fide retirement plans like the exception contained in federal law, an employer's ability to grant retirement benefits only to those persons who reach a certain age (clearly permitted by ERISA and the ADEA) would vary from state to state unless such state laws were deemed preempted by ERISA. These are only a few examples. If preemption is not recognized, employee benefit plans which are drafted to comply with the highly detailed regulations of ERISA and the ADEA (which are replete with guidelines regarding age-based conveyance of or reduction in benefits) would be subject to piecemeal regulation by states and even municipalities under local antidiscrimination statutes. In short, the decision in this case will clearly have an impact far beyond the matter of disability benefits for pregnancy.

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2. The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634 ("ADEA"), prohibits discrimination on the basis of age against persons between the ages of 40 through 70.

3. For example, the age discrimination provision in the New York HRL encompasses persons between the ages of 18 and 65. N.Y. Exec. Law § 296.3-a(9) (McKinney 1982).

4. *See* California Fair Employment and Housing Act, Cal. Gov't. Code § 12941 (West 1980 & Supp. 1982); Pennsylvania Human Relations Act, Pa. Stat. Ann., tit. 43, §§ 951-963 (Purdon 1964 & Supp. 1965-81).

For the reasons discussed below, the Court of Appeals correctly held that the HRL is preempted by ERISA. The statutory language of § 514 of ERISA expressly provides for preemption of "any and all state laws" relating to employee benefit plans. Where, as here, Congress has expressly provided for broad and all-inclusive preemption, it must be recognized. The legislative history of ERISA also clearly shows that Congress intended preemption of state law in its broadest sense. Congress originally considered and rejected narrow preemption provisions limiting the scope of preemption to subjects covered by ERISA. But Congress enacted instead a broad preemption section. The debates and other legislative history, discussed *infra*, unequivocally confirm that Congress intended the broadest possible preemption. Further, this Court's decision in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), recognized that uniform federal law was exclusively to govern ERISA-covered employee benefit plans.

Moreover, the HRL is not saved from preemption merely because another federal statute (Title VII) did not preempt the HRL. Title VII does not guarantee that state laws such as the HRL may not be preempted by *other* federal laws, such as ERISA. Further, preemption of state fair employment laws would not "alter, amend, modify, invalidate, impair, or supersede" Title VII within the meaning of ERISA § 514(d) because Title VII, while it accommodates such state laws, does not incorporate them, require them to be enacted, or depend on their existence in any way. Congress has also made clear that ERISA was intended to preempt state fair employment laws along with all other state laws not specifically excepted from preemption by ERISA. Such preemption does not hinder or limit enforcement of antidiscrimina-

tion standards to ERISA-covered plans; it merely ensures that existing federal antidiscrimination law will apply uniformly to such plans, for which a uniform law is vital.

ARGUMENT

I. Section 514 Of ERISA Preempts Application Of State Fair Employment Practice Laws, Including The New York Human Rights Law, To Disability Benefits Plans Covered By ERISA.

In enacting ERISA, Congress provided for broad federal preemption of the employee benefit plan area. The ERISA preemption provision is contained in § 514(a), 29 U.S.C. § 1144(a), which provides in the clearest possible terms that all state laws purporting to regulate employee benefit plans subject to ERISA are preempted unless specifically excepted. In full, § 514(a) provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede *any and all State laws insofar as they may now or hereafter relate to any employee benefit plan* described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975. [Emphasis added.]

To the extent that the HRL purports to regulate the terms of disability plans subject to ERISA by requiring such plans to treat pregnancy as a covered disability, it falls squarely within the preemption rule of § 514(a). There is no dispute that Appellees' benefits plans in question are "employee benefit plans" as defined in ERISA. 29 U.S.C. §§ 1002(1), 1002(3). Further, the HRL is a state law within the meaning of ERISA, and it is a state law that has not been exempted from ERISA preemption. The only state laws which were exempted from ERISA preemption are state laws which regulate insurance, banking, and securities and generally applicable state criminal laws. 29 U.S.C. §§ 1144(b)(2)(A) and 1144(b)(4). The HRL is of neither sort.

It is also well-settled that where a statute expressly provides for broad preemption, it is to be recognized. *E.g., Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In the present case, ERISA "expressly provides" for preemption. And the scope of the preemption expressly provided by § 514 is broad and all inclusive. In fact, we cannot imagine more careful and exhaustive statutory preemption language than is explicitly provided in 29 U.S.C. §§ 1144(a) and 1144(b).[5] Thus, ERISA's language must be given effect as it is written.

Where Congress has explicitly provided for preemption in the statute and explicitly stated the scope thereof, we need not search through the legislative history to try to ascertain whether preemption was intended. Nor need we try to infer what Congress may have intended from an analysis of whether there might be a conflict between federal and state regulation. However, even if § 514 were not clear on this point, the legislative history of that section also confirms repeatedly and unequivocally that preemption of the employee benefit field was intended in the broadest possible sense.

The first versions of ERISA would have preempted only state laws dealing with specific subject areas of ERISA. Thus, the version of ERISA first introduced in the House of Representatives proposed merely to "supersede any and all laws of the States and of political subdi-

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5. The language of ERISA is entitled to particular deference because ERISA was drafted with particular care; as this Court recently observed, ERISA is a "comprehensive and reticulated statute" adopted after "almost a decade of stud[y]." *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980).

visions thereof insofar as they may now or hereafter relate to the *fiduciary, reporting, and disclosure responsibilities* of persons acting on behalf of employee benefit plans . . . ."[6]

The version of ERISA first introduced in the Senate similarly proposed only to "supersede any and all laws of the States . . . insofar as they may now or hereafter relate to the *subject matters regulated by this Act* . . . ."[7]

Yet the preemption provision that emerged from the House-Senate conference and that was ultimately enacted takes an approach fundamentally different from that taken by the House and Senate bills. While narrowly-worded preemption provisions were initially proposed, Congress abandoned that approach and actually enacted a broad preemption provision superseding "any and all State laws." 29 U.S.C. § 1144(a). The House-Senate conference committee report, as well as remarks on the floor of the House and the Senate by members of the conference committee which drafted the preemption provision actually enacted, conclusively confirm Congress' broad preemption purpose.

The House-Senate conference committee that drafted § 514 took care to explain the broad regime of exclusive federal law created by that provision. The committee's report stated that all civil actions over the terms of a plan "are to be regarded as arising under the laws of

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6. H.R. 2, 93d Cong., 1st Sess. § 114 (1973) (emphasis added), *reprinted in* I Subcommittee on Labor, Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974*, at 3, 50-51 (1976) [hereinafter cited as *Legislative History*].

7. S. 4, 93d Cong., 1st Sess. § 609 (1973) (emphasis added), *reprinted in* I *Legislative History* at 93, 186.

the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947."[8] Moreover, three members of the conference committee amplified this point at length—and without contradiction—in prepared remarks on the floor of the House and the Senate.

Congressman Dent, who had introduced the first House version of ERISA, explained the broad preemption approach contained in the final bill:[9]

> Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority of the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation . . . .
>
> The conferees, with the narrow exceptions specifically enumerated, applied this principle *in its broadest sense* to foreclose any non-Federal regulation of employee benefit plans. Thus, the provisions of section 514 would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof—including any professional society or association operating under color of law—which would affect any employee benefit plan as described in section 4(a) and not exempt under section 4(b).

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8. H. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327 (1974), *reprinted in* III *Legislative History* at 4277, 4594.

9. 120 Cong. Rec. 29197 (1974) (emphasis added), *reprinted in* III *Legislative History* at 4670-4671.

Senator Williams, who had introduced the first Senate version of ERISA, gave a similar report to the Senate.[10] Further, Senator Javits, a leading sponsor of ERISA, explained why total preemption, rather than limited preemption, was adopted:[11]

> Both House and Senate bills provided for preemption of State law but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.
>
> Although the desirability of further regulation —at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans *required*—but for certain exceptions—*the displacement of State action in the field of private employee benefit programs.*

In short, the evolution of ERISA's preemption provisions, the committee reports thereon, and the comments of its drafters unanimously confirm that Congress meant

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10. *See* 120 Cong. Rec. 29933 (1974), *reprinted in* III *Legislative History* at 4745-46.

11. 120 Cong. Rec. 29942 (1974) (emphasis added), *reprinted in* III *Legislative History* at 4770-71.

to preempt all state laws, including state fair employment laws such as the HRL.

Finally, the only previous case in which this Court has given plenary consideration to ERISA's preemption provision, *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), recognized and enforced Congress' intention to preserve an exclusive domain for federal law in the area of employee benefit plans.

In *Alessi*, retired employees who had received workers' compensation awards subsequent to their retirement brought suit to challenge provisions in their employers' pension plans reducing or offsetting a retiree's benefits by an amount equal to a workers' compensation award for which the retiree was eligible. The retirees relied on, *inter alia*, a New Jersey statute which prohibited such "integration" of pension benefits with workers' compensation benefits. This Court held that ERISA preempted the New Jersey statute. The Court also enunciated preemption principles under ERISA which likewise apply to the situation presented herein.

Quoting the plain language of ERISA § 514(a), the Court held that Congress "meant to establish pension plan regulation as *exclusively a federal concern.*" 451 U.S. at 523 (footnote omitted and emphasis added). The Court further recognized that the only relevant state laws that survive the preemption provision in § 514(a) are those relating to employee benefit plans that are themselves exempt from ERISA's scope. 451 U.S. at 523 n.20. ERISA also specifically excepts from preemption state insurance, banking and securities laws and general criminal statutes, but none of those state laws were relevant to *Alessi* and none are relevant to this case either. Moreover, the Court explained that a state statute that eliminates from ERISA-covered benefit plans terms that

are permitted by federal law is preempted. 451 U.S. at 524.

Applying the preemption principles enunciated in *Alessi* to the situation presented in the instant case, it is clear that the application of the HRL to the Appellee employers' plans has likewise been preempted by ERISA. There is no dispute that the disability benefit plans at issue here are covered by ERISA. And during the time period relevant to the present case, federal law permitted employers to provide or exclude benefits for pregnancy-related disabilities at their own option or as they might agree through collective bargaining. *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). By requiring employers to provide pregnancy benefits, the HRL applies directly to matters that federal law then reserved to private choice, and it eliminated one permissible method for allocating the cost of pregnancy-related disabilities. Thus, under the teaching of *Alessi*, the HRL "relates to" an ERISA-covered benefit plan within the meaning of § 514(a) of ERISA, and it is therefore preempted by that provision.

Apart from its "bootstrapping" argument, which we address in the next section of this brief, New York attempts to distinguish *Alessi* in essentially two ways.

First, New York argues that the HRL "is a statute of general applicability prohibiting employment discrimination," unlike the statute at issue in *Alessi*, which it characterizes as one that "specifically regulated . . . pension benefits."[12] New York cites no authority, however, for the

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12. Brief for Appellants at 34-45.

The American Civil Liberties Union's *amicus* brief, at 42-45, suggests that federal law should be

proposition that preemption standards for state statutes of general applicability should differ from those for state statutes more narrowly aimed. That proposition is incorrect as a general matter and is particularly inappropriate to construction of ERISA § 514, for Congress knew how to exempt state statutes of general applicability from the preemption rule, as evidenced by the exemption in ERISA § 514(b)(4) for "any generally applicable criminal law of a State," but Congress did not choose to exempt generally applicable state fair employment statutes. Moreover, *Alessi* itself rejected New York's proposition:

> It is of no moment that New Jersey intrudes indirectly, through a workers' compensation law rather than directly, through a statute called "pension regulation." ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern.

451 U.S. at 525. Thus, ERISA preemption is guided not by the aim of the state law but by its actual effect upon an ERISA-covered plan.

Second, New York asserts that *Alessi* found affirmative evidence that Congress intended to allow employee benefit plans to contain the terms forbidden by the state law there in issue. By contrast, it argues, ERISA "has nothing to do with" employment discrimination. Brief for Appellants at 35. That argument has three independent flaws. First, *Alessi's* preemption holding did not depend on the finding of such affirmative evidence of

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exclusive over pension plans to a greater extent than over welfare benefit plans. There is no warrant in the statutory language for any such distinction, and *Alessi* cannot be distinguished from this case on the ground that it involved a pension plan rather than a welfare benefit plan. ERISA § 514(a) preempts all laws relating to any "employee benefit plan," and that term is defined to include both pension and welfare plans. ERISA § 3(3), 29 U.S.C. § 1002(3).

legislative intent. The Court discussed that legislative history only to rebut the argument that *ERISA itself* forbade the challenged terms, not to rebut the argument that a *state law* could forbid those terms. 415 U.S. at 415-21. Next, New York's argument is a throwback to the narrow statutory preemption language specifically considered *and rejected* by Congress. Even though ERISA itself does not address discrimination, § 514 nevertheless mandates that uniform federal law govern all aspects of employee benefit plans except for those areas specifically reserved to state law by Congress. Finally, New York's argument would render § 514 meaningless. New York's suggestion that only subjects dealt with by ERISA are preempted amounts to a suggestion that ERISA preemption should be analyzed under principles of implied preemption that would apply even in the absence of an express preemption provision.

The wisdom of Congress' deliberate choice to provide for uniform and exclusive federal law governing employee benefit plans is, of course, not a question for this Court. Nevertheless, Congress' choice was wise, for any other policy would lead to patently undesirable results. The need for uniform law in the field of employee benefit plans is evident. As Congress noted, "the operations of employee benefit plans are increasingly interstate."[13] Employee benefit plans resulting from industry-wide collective bargaining agreements, or single-employer plans by multistate companies are common. Creation and administration of such plans requires a delicate actuarial balancing of the expected payments in

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13. H. R. Rep. No. 553, 93d Cong., 1st Sess. 12 (1973), *reprinted in* II *Legislative History* at 2348, 2359.

benefits against the levels of funding required to maintain solvency. If each individual state in which a plan operated were allowed to alter the terms on which benefits must be paid out of the plan's funds, those calculations would be utterly upset: funding would have to be increased in ways not anticipated at the time the plan was negotiated and not bargained for by the employees, the solvency of such plans could be affected, and orderly central administration of such plans would be impossible.[14]

In sum, Congress has explicitly provided for preemption of the employee benefit field in the broadest possible sense. That is evident not only from the explicit language of the statute but also from its legislative history. In an effort to overcome the language and legislative history of § 514, Appellants rely almost entirely on the contention that ERISA does not preempt the HRL because Title VII of the Civil Rights Act of 1964 did not preempt the HRL. As Westinghouse will now discuss, that contention is without merit.

II. The Fact That Title VII Of The Civil Rights Act Did Not Preempt The HRL Does Not Mean That ERISA Did Not Preempt Application Of The HRL To ERISA-Covered Employee Benefit Plans.

New York argues that because Title VII of the Civil Rights Act of 1964 did not preempt state fair employ-

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14. Benefit requirements imposed by state law could adversely affect the interests of not only the plan itself but also a United States government agency—the Pension Benefit Guaranty Corporation—which was created by ERISA and which guarantees pension benefits in private pension plans. *See Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980).

ment practice laws such as the HRL, ERISA could not be held to preempt the HRL. New York's reasoning on this point is clearly in error.

Section 514(d) of ERISA specifically states that it does not supersede any other *federal* laws. Title VII is another federal law which deals with all types of employment practices, including, but not limited to, employee benefit plans. New York contends, in a "bootstrapping" fashion, that because Title VII did not preempt state antidiscrimination statutes, ERISA did not do so either. This is a *non sequitur.*

The fact that one federal statute (especially one such as Title VII which deals with a multitude of employment practices) did not preempt state regulation of the subjects which it covered,[15] does not mean that another federal statute such as ERISA (which dealt with only one subject, employee benefit plans, and which emphasized development of a coordinated scheme for regulating those plans) could not have preempted application of state antidiscrimination statutes to such plans.

First, the structure and language of ERISA itself strongly suggest that state antidiscrimination laws such as the HRL were preempted. Section 514(d) of ERISA, 29 U.S.C. § 1144(d), states:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

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15. Section 708 of Title VII merely provides that nothing in Title VII "shall be deemed to exempt or relieve any person from any liability" provided by state law. 42 U.S.C. § 2000e-7.

This provision *does not state* that ERISA shall not supersede "any law of the United States and any state law not superseded by any law of the United States." Thus, the fact that Title VII did not supersede state antidiscrimination laws does not mean that ERISA did not preempt application of such state antidiscrimination laws to employee benefit plans.

This Court has rejected, in *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942), the same type of bootstrapping argument urged by New York here. In that case, the issue was whether certain packers were exempt from Alabama state regulations on renovated butter due to various federal statutes regulating renovated butter. Alabama noted that one federal statutory provision, an Internal Revenue Code provision affecting renovated butter, contemplated and expressly stated that its provisions should not be held to exempt any person from state penalties or in any manner to authorize continuance of business in renovated butter in that state contrary to the laws of such state (in much the same way that Title VII provides that it does not relieve any person from regulation by state laws). Alabama argued that the Internal Revenue Code provision had therefore "saved" the state regulations on renovated butter from possible preemption by other federal statutory provisions, also regulating renovated butter. This Court flatly rejected this bootstrapping argument, saying (315 U.S. at 162):

> [The Internal Revenue Code provision] without doubt manifests the will of Congress that federal taxation shall not, of itself, incapacitate the state. [Citations omitted.] In our view, however, the section goes no farther than to make certain that federal taxation shall not paralyze state action. Other regulations may or may not supersede state laws.

The Court went on to find that other federal statutory provisions did preempt state regulation. Because these other federal statutory provisions contained no explicit language regarding preemption, the Court applied the standard for ascertaining implied preemption and found that implied preemption existed because the state regulation was inconsistent with regulation under these other federal statutory provisions.

The instant case is an even stronger case for preemption than *Cloverleaf Butter* since the second set of statutory provisions here (ERISA) contains an *explicit* preemption provision. Thus, the fact that the first set of statutory provisions (Title VII) did not preempt state fair employment statutes does not mean that ERISA did not intend to preempt application of such state statutes to employee benefit plans.[16]

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16. *Alessi* itself rejected this type of "bootstrapping". In *Alessi*, retirees argued that, although ERISA § 514 appeared to preempt the New Jersey workers' compensation law at issue, a different provision of ERISA preserved it from preemption. The cited provision of ERISA saved from coverage by ERISA plans "maintained solely for the purpose of complying with applicable workmen's compensation laws," 29 U.S.C. § 1003(b)(3), and thus implicitly recognized the continuing vitality of state workers' compensation laws after ERISA. The Court rejected that argument, pointing out that ERISA's acknowledgement of the continuing vitality of state law in general (for example, as applied to matters not involving an ERISA-covered plan) does not preserve such law from express preemption as applied to an ERISA-covered plan. 451 U.S. 523, n. 20. By the same token, Title VII's acknowledgement of the continuing vitality of state fair employment laws in general does not preserve such laws from express preemption as applied to an ERISA-covered plan.

Moreover, if the functioning of state antidiscrimination laws as they relate to employee benefit plans were really thought to be critical by Congress, they would have been expressly saved from preemption. Congress created exceptions for state banking, insurance, securities and generally applicable criminal statutes *but not state antidiscrimination statutes.* Under the principle of *expressio unius est exclusio alterius*, it must be concluded that Congress intended to preempt state antidiscrimination statutes. *See First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152 (1946).

New York's approach is not logical for yet another reason. If New York's argument were correct, then ERISA's exclusion of insurance, banking, and securities laws from preemption would be meaningless because the federal statutes dealing with insurance, securities, and banking already contained provisions saving from preemption state laws dealing with the same subjects.[17] The fact that state insurance, securities, and banking statutes were explicitly exempted from ERISA's preemption provision makes obvious that Congress did not intend that

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17. For example, Section 2(b) of the Act of March 9, 1945 (McCarran-Ferguson Act), 15 U.S.C. § 1012(b), provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance. . . ." Similar broad savings clauses appear in the federal securities laws, see § 18 of the Securities Act of 1933, 15 U.S.C. § 77r, and § 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), and in various banking laws, see § 13 of the Federal Reserve Act, 12 U.S.C. § 330, and § 7 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1846.

state statutes be exempted from ERISA's preemption provision by reason of their exemption from preemption by another federal statute, such as Title VII.

Moreover, the enforcement scheme created by Title VII is not such that preemption by ERISA of state antidiscrimination laws would "alter, amend, modify, invalidate, impair, or supersede" Title VII. Title VII accommodates parallel state laws, but does not depend in any way on their existence. Title VII applies uniformly throughout the country regardless of whether states have enacted their own antidiscrimination law; indeed, Congress specifically rejected proposals to limit the applicability of Title VII in states with such laws.[18] Unlike, for example, § 110 of the Clean Air Act, 42 U.S.C. § 7410, Title VII does not require states to have an antidiscrimination law. Nor does it federalize such laws that the states choose to enact. Unlike, for example, the Federal Tort Claims Act, 28 U.S.C. § 1346(b), or the Assimilative Crimes Act, 18 U.S.C. § 13, Title VII does not incorporate state law into federal law. Nor does Title VII permit federal authorities to enforce such state laws; the EEOC has power only to enforce Title VII itself. *See* Title VII § 706, 42 U.S.C. § 2000e-5.

Apart from the "savings" language in § 708, Title VII mentions state law only to coordinate federal enforcement proceedings with state enforcement proceedings, primarily by requiring the EEOC to wait sixty days before acting on a charge filed in a jurisdiction with an

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18. *See* 110 Cong. Rec. 2727, 2828 (1964). Related proposals are collected in *Kremer v. Chemical Construction Corp.*, 50 U.S.L.W. 4487, 4496-97 (U.S. 1982) (Blackmun, J., dissenting).

applicable fair employment law.[19] Such accommodation of state enforcement proceedings does not incorporate the substantive standards of state antidiscrimination laws into Title VII.

In the first place, Title VII has its own self-contained enforcement provisions that operate whether or not state enforcement proceedings exist. If a charge of discrimination is filed with the EEOC in a jurisdiction with applicable local enforcement procedures, the EEOC automatically assumes concurrent jurisdiction over the charge upon expiration of the sixty-day deferral period;[20] and in the many jurisdictions without local enforcement procedures, the federal enforcement mechanisms are necessarily exclusive.[21] Moreover, "Congress intended federal courts to exercise final responsibility for enforcement of Title VII," and the aggreived party can file a lawsuit 180 days after the EEOC assumes jurisdiction regardless of

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19. Title VII § 706(c), 42 U.S.C. § 2000e-5(c). The only other two allusions to state law in Title VII are closely related to this deferral process: the EEOC must give "substantial weight" to findings of fact by state authorities in such enforcement proceedings, § 706(b), 42 U.S.C. § 2000e-5(b); and the EEOC is authorized (but not compelled) to coordinate its enforcement efforts with those of willing states, §§ 705(g) (1), 709(b), 709(d), 42 U.S.C. §§ 2000e-4(g) (1), 2000e-8(b), 2000e-8(d).

20. *See New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64-65 & n.5 (1980); *Love v. Pullman Co.*, 404 U.S. 522, 526 (1972).

21. No statewide enforcement agency is deferred to by the EEOC in Alabama, Arkansas, Louisiana, Mississippi, Texas, or Virginia, and deferral is limited to certain types of alleged Title VII violations in Georgia, Hawaii, North Carolina, Puerto Rico and Wisconsin. *See* 29 C.F.R. § 1601.74 (1981).

the posture of any state proceedings.[22] State fair employment laws and enforcement procedures thus are simply not necessary to the operation of Title VII.

Second, Title VII's accommodation of state fair employment laws is purely procedural. It merely places the burden of administrative investigation initially on state authorities, if such authorities are able and willing to act. Title VII in no way assimilates state substantive law into federal law. Yet New York's argument is precisely that Title VII implicitly incorporates the *substantive* standards of the HRL.

Finally, although Congress may have intended to permit states to enact fair employment laws more rigorous than Title VII in the usual case, this is not a usual case. Congress has not hesitated to foreclose such state laws in narrow areas where there is a need for uniform federal law. For example, discrimination in employment by the federal government is governed exclusively by federal law. *See* Title VII § 717, 42 U.S.C. § 2000e-16; *Brown v. General Services Administration*, 425 U.S. 820, 825 (1976). It should therefore not be surprising that Congress has made federal fair employment law exclusive in other narrow areas where it saw a need for uniformity. New York's bootstrapping argument is simply a semantic attempt to defeat Congress' expressly stated purpose to create a uniform federal law for employee benefit plans.

New York cites no authority to the contrary. The cases it cites do not even approach the proposition that Congress has been unwilling to make federal fair em-

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22. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44-45 (1974). *See New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 65 n.5 (1980).

ployment law exclusive in specialized areas; those cases merely construe the scope of Title VII's express deferral provisions.[23]

Thus, neither the language nor the structure of Title VII provides any basis for disregarding the plain command of ERISA § 514. Moreover, there is additional legislative history which makes clear that Congress intended ERISA's preemption provisions to apply to state antidiscrimination laws.

First, during the debates over the bills that would eventually become ERISA, Senator Mondale and Representative Abzug each planned to introduce amendments forbidding discrimination by plans subject to ERISA. After virtually identical colloquies with the leading sponsor of ERISA in each chamber—Senator Williams and Representative Dent, respectively—Senator Mondale and Representative Abzug decided not to offer their proposed amendments. They did so because the sponsors explained that Title VII already would apply to such plans:[24]

> Mr. Williams. . . . Although I fully share your concern for full enforcement of nondiscrimination requirements affecting pension and profit-sharing plans, I believe that the thrust toward centralized administration of nondiscrimination in employment

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23. *E.g., Kremer v. Chemical Construction Corp.*, 50 U.S.L.W. 4987 (U.S. 1982); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980); *Love v. Pullman Co.*, 404 U.S. 522 (1972).

24. 119 Cong. Rec. 30409 (1973), *reprinted in* II *Legislative History* at 1862-63. *See also* 120 Cong. Rec. 4726 (1974), *reprinted in* III *Legislative History* at 3518-19 (statements of Representatives Abzug and Dent).

> must be maintained. And I believe this can be done by the Equal Employment Opportunity Commission under terms of existing law.

New York argues that Senator Williams' comment about "terms of existing law" was intended to include "existing . . . incorporation of state fair employment laws." Brief for Appellants at 31. That argument is incorrect. Neither Title VII nor any other federal law then or now "incorporates" state fair employment laws. Senator Williams' comment about "existing law" by its terms referred only to enforcement "by the Equal Employment Opportunity Commission," and the EEOC then as now enforces only Title VII; it has no power to enforce state fair employment laws.

A second item of legislative history which reaffirms that state fair employment laws were not meant to be exempt from preemption by ERISA appears in the debates on the 1978 amendments to the ADEA. Senators Javits and Williams made clear that ERISA's preemption provisions would apply to state antidiscrimination laws even though the ADEA (like Title VII) had explicitly preserved state antidiscrimination laws from preemption by the ADEA. Senators Javits and Williams stated as follows:

> Mr. Javits. Finally, Mr. President, it is understood that just as these age discrimination amendments do not interfere with ERISA, State age discrimination in employment laws also are not to interfere with ERISA. The ADEA itself, as pointed out in the Senate report, does not preempt such State age discrimination laws. However, there should be no question that the *preemption rules of section 514(a) of ERISA shall be determinative regarding the preemption of State age discrimination laws which di-*

> *rectly or indirectly establish requirements relating to employee benefit plans. ERISA's preemption of State age discrimination laws shall be determined without regard to section 514(d) of ERISA or the fact that the ADEA does not itself preempt State law.*
>
> Mr. Williams. I concur in my friend's observations as they accurately state the controlling principles of law in this regard. Federal law *will preempt State age discrimination statutes only to the extent that those laws relate to an employee benefit plan described in section 4(a) of ERISA and are not exempt under section 4(b) of ERISA.*

124 Cong. Rec. 8219 (1978) (emphasis added).

The same preemption reasoning that applies to the ADEA also applies to Title VII because their provisions regarding state law are virtually identical. Like Title VII, the ADEA contains a provision for sixty-day deferral to state authorities that was "patterned after and is virtually *in haec verba* with § 706(c) of Title VII." *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979). Further, because Senators Williams and Javits were prime sponsors of ERISA, their colloquy is entitled to special weight. *See, e.g., Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951). It establishes beyond doubt that Congress intended state fair employment laws to be displaced by federal law as applied to ERISA-covered employee benefits plans, even though such laws are undisturbed by the ADEA or Title VII.[25]

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25. There is no merit in New York's suggestion that the legislative history of the Pregnancy Disability

The language and legislative history of ERISA therefore indicate that federal law exclusively governs claims that the terms of an ERISA-covered employee benefit plan are unlawfully discriminatory. Contrary to New York's suggestions, *see* Brief of Appellants at 28-29, Congress' choice to do so was eminently sensible and does not lead to anomalous or unfair results. Procedurally, employees who believe that they have been the victim of unlawful discrimination by a plan have full recourse to Title VII's enforcement procedures, which were designed to accommodate complaints of discrimination regardless of whether a state fair employment statute exists.

Substantively, Title VII is a well-developed and carefully considered fair employment law. It is true that Title VII does not of its own force apply to employers who employ fewer than fifteen workers, but that does not mean that plans by employers not subject to Title VII would not be subject to any federal antidiscrimination law. Just as this Court created a duty of fair representation in the context of collective bargaining subject exclusively to federal law, so could it create a federal common law of employment discrimination applicable to employee benefit plans subject exclusively to federal law

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Amendment to Title VII, Pub. L. No. 95-555, 92 Stat. 2076, bears on whether ERISA preempted application of the HRL to ERISA-covered plans. *See* Brief for Appellants at 33. The Pregnancy Disability Amendment applied to many situations not involving ERISA-covered plans, and the two committee reports New York cites do not even mention ERISA; they simply recognize that Title VII does not itself preempt state fair employment laws. Furthermore, Senator Williams, who submitted the Senate report cited by New York, as well as Senator Javits, who co-sponsored the Pregnancy Disability Amendment, both stated in the quoted colloquy that ERISA does preempt state fair employment laws.

and not directly subject to Title VII. Lower federal courts have already developed a thriving federal common law under ERISA in other contexts.[26] Moreover, Congress recognized that exclusive federal regulation of ERISA-covered plans may not provide all the substantive regulation which may ultimately be desired—that further regulation "undoubtedly warrants further attention"—but Congress deliberately concluded that the benefits of exclusive federal regulation outweighed the disadvantages. *See* Remarks of Sen. Javits, *supra*, at 11. It is not for this Court to rebalance those interests.

During the time period relevant to this case, however, Title VII *did* apply of its own force to the Appellee employers, and Title VII concededly did *not* require plans to treat pregnancy as a disability. Hence the employers at bar violated no federal law. Preempting application of the HRL to employee benefit plans subject to ERISA thus in no way undercuts the important national task of abolishing invidious discrimination in all phases of employment. It merely allows one sovereign to lay down uniform law in one narrow area where uniformity is vital.

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26. *See, e.g., Murphy v. Heppenstall Co.*, 635 F.2d 233, 237 (3d Cir. 1980), *cert. denied*, 71 L. Ed. 2d 293 (1982); *Amato v. Bernard*, 618 F.2d 559, 566-67 (9th Cir. 1980); *Wayne Chemical, Inc. v. Columbus Agency Service Corp.*, 426 F. Supp. 316, 321-22 (N.D. Ind. 1977), *modified and aff'd on other grounds*, 567 F.2d 692 (7th Cir. 1977).

CONCLUSION

For these reasons, this Court should affirm the holding of the United States Court of Appeals for the Second Circuit that ERISA preempts application of the New York HRL to employee benefit plans subject to ERISA.

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No. 81-1578

In the Supreme Court of the United States

OCTOBER TERM, 1982

WERNER H. KRAMARSKY, ETC., ET AL., APPELLANTS

v.

DELTA AIR LINES, INC., ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTIONS PRESENTED

1. Whether Section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144(a), preempts the New York Human Rights Law, which prescribes the terms and conditions of ERISA-covered welfare plans by prohibiting the denial of employee disability benefits based on pregnancy.

2. Whether Section 514(a) of ERISA preempts the New York Disability Benefits Law, which requires employers to provide certain minimum disability benefits to pregnant employees, where compliance with the New York Law could be achieved by requiring employers to establish separately administered plans excluded from ERISA coverage under Section 4(b)(3), 29 U.S.C. 1003(b)(3).

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement:	
A. Statutory background	2
B. Proceedings below	6
Summary of argument	10
Argument:	
I. Section 514(a) of ERISA preempts the New York Human Rights Law, which seeks to regulate the terms and conditions of ERISA-covered plans by prohibiting the denial of disability benefits for pregnancy	12
II. Section 514(a) of ERISA preempts the New York Disability Benefits Law as it relates to ERISA-covered plans; however, New York may enforce its Disability Benefits Law against employers and require compliance through separately administered plans exempt from ERISA coverage under Section 4(b)(3)	20
A. Section 4(b)(3) excludes from ERISA coverage only entire plans, and not portions of plans, that are maintained solely to comply with the Disability Benefits Law	21
B. New York may enforce its Disability Benefits Law by requiring employers to establish separately-administered plans exempt from ERISA coverage under Section 4(b)(3)	25
Conclusion	30

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Cases: Page

Alessi v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 .. 7, 10, 11, 12, 13, 14, 23
Brooklyn Union Gas Co. v. *New York State Human Rights Appeal Board*, 41 N.Y.2d 84, 359 N.E.2d 393, 390 N.Y.S.2d 884 4
Bucyrus-Erie Co. v. *Department of Industry, Labor and Human Relations*, 599 F.2d 205, cert. denied, 444 U.S. 1031 8
General Electric Co. v. *Gilbert*, 429 U.S. 125 4
Hewlett-Packard Co. v. *Barnes*, 425 F. Supp. 1294, aff'd, 571 F.2d 502, cert. denied, 439 U.S. 831 29
Kremer v. *Chemical Construction Corp.*, No. 80-6045 (May 17, 1982) 16
Love v. *Pullman Co.*, 404 U.S. 522 16
Malone v. *White Motor Corp.*, 435 U.S. 497 12
Minnesota Mining & Manufacturing Co. v. *Minnesota*, 444 U.S. 1041, dismissing appeal, 289 N.W.2d 396 .... 7, 8
Mountain States Telephone & Telegraph Co. v. *Commissioner*, 445 U.S. 921, dismissing appeal, 608 P.2d 1047 .... 7, 8
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Rainwater v. *United States*, 356 U.S. 590 19
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United States v. *Philadelphia National Bank*, 374 U.S. 321 19
United States v. *Price*, 361 U.S. 304 19
Uinted States v. *Southwestern Cable Co.*, 392 U.S. 157 19
United States v. *United Mine Workers*, 330 U.S. 258 19
United States v. *N.M. Webb, Inc.*, 397 U.S. 179 19
Waterman Steamship Corp. v. *United States*, 381 U.S. 252 19

Statutes: Page

Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189.. 8, 18
Civil Rights Act of 1964, Title VII, 42 U.S.C. (& Supp. IV) 2000e *et seq.* 4, 8, 10, 16, 17, 19
42 U.S.C. 2000e-5(c) 17
42 U.S.C. 2000e-7 ..... 8, 16
Employee Retirement Income Security Act of 1974, Title I, 29 U.S.C. (& Supp. IV) 1001 *et seq.*.....*passim*
Section 2(b), 29 U.S.C. 1001(b) 2
Section 3(1), 29 U.S.C. 1002(1) 2, 3, 5, 22, 27
Section 3(37), 29 U.S.C. 1002(37) 3
Section 4(b)(3), 29 U.S.C. 1003(b)(3) .....*passim*
Sections 101-111, 29 U.S.C. (& Supp. IV) 1021-1031 3
Section 402(a), 29 U.S.C. 1102(a) 3
Section 402(a)(1), 29 U.S.C. 1102(a)(1) .. 3
Section 402(b), 29 U.S.C. 1102(b) 3
Section 403(a), 29 U.S.C. 1103(a) 3
Sections 404-413, 29 U.S.C. (& Supp. IV) 1104-1113 3
Section 514(a), 29 U.S.C. 1144(a) .....*passim*
Section 514(b)(2), 29 U.S.C. 1144(b)(2) .. 18
Section 514(b)(4), 29 U.S.C. 1144(b)(4) .. 18
Section 514(c)(2), 29 U.S.C. 1144(c)(2) .. 13
Section 514(d), 29 U.S.C. 1144(d) 4, 8, 10, 15, 16, 17, 19
Federal Unemployment Tax Act, 26 U.S.C. 3304(a)(1) 26
Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076, 42 U.S.C. (Supp. IV) 2000e(k) ..4, 10, 16, 17, 20
Welfare Pension Plans and Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997, 29 U.S.C. 301 *et seq.*..... 12, 24
Cal. Unemp. Ins. Code § 2601 *et seq.* (West 1972 & Cum. Supp. 1982) 5
Hawaii Rev. Stat. § 392-1 *et seq.* (1976 & Supp. 1981) 5
N.J. Stat. Ann. 43:21-25 *et seq.* (West 1962 & Cum. Supp. 1981-1982) 5
1977 N.Y. Laws ch. 675, § 29 5

Statutes—Continued — Page

1981 N.Y. Laws ch. 352 5
N.Y. Exec. Law § 296.1(a) (McKinney Supp. 1972-1981) 4
N.Y. Work. Comp. Law (McKinney):
§ 204.1 (1965) 4-5
§ 204(2) (Supp. 1981-1982) 5
§ 205(1) (Supp. 1981-1982) 5
§ 211 (1965) 5
§ 355.6 App. (Supp. 1981-1982) 26
R.I. Gen. Law § 28-39-1 *et seq.* (1956) 5

Miscellaneous:

120 Cong. Rec. (1974):
p. 4742 14
p. 5002 14
p. 29197 14
p. 29933 14
p. 29942 ..... 14, 15
124 Cong. Rec. 8218-8219 (1978) 8, 18
H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. (1974) 14
H.R. Rep. No. 95-948, 95th Cong., 2d Sess. (1978) .. 19
4 A. Larson, *The Law of Workmen's Compensation* (1982) 27
S. Rep. No. 95-331, 95th Cong., 1st Sess. (1977) 19
Oversight on ERISA, 1978: Hearings Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 95th Cong., 2d Sess. (1978) 15

In the Supreme Court of the United States

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v.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE UNITED STATES

This case involves the application of two provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. (& Supp. IV) 1001 *et. seq.* Section 514(a) of ERISA, 29 U.S.C. 1144 (a), provides that the federal statute "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. Section 4(b)(3), 29 U.S.C. 1003(b)(3), excludes from ERISA coverage plans that are maintained "solely" to comply with state unemployment compensation, workers' compensation, or disability insurance laws. The Secretary of Labor is charged with the responsibility of enforcing the re-

porting and disclosure and the fiduciary obligations that ERISA imposes on private employee benefit plans. He therefore has a substantial interest in the proper interpretation of ERISA's broad preemption provision, which Congress enacted to promote the development of private pension and welfare plans and to assure uniform regulation of such plans. Similarly, the Secretary has an interest in the determination of which types of plans are excluded from ERISA coverage, particularly as that exclusion relates to the preemption provision.

STATEMENT

A. Statutory Background

1. Congress enacted ERISA in 1974 to promote the well-being and security of employees and their beneficiaries by protecting their interests in employee benefit plans. 29 U.S.C. 1001(b). In addition to pension plans, the statute covers a wide range of "welfare" plans offering benefits for such contingencies as illness, accident, disability and unemployment. 29 U.S.C. 1002(1). The statute broadly defines a covered "welfare plan" as "any plan, fund, or program * * * established or maintained by an employer or by an employee organization, or by both * * * for the purpose of providing [such benefits] for its participants or their beneficiaries, through the purchase of insurance or otherwise * * *." *Ibid.*

ERISA imposes certain uniform standards on the design, administration, and operation of plans. Each welfare benefit plan, for example, must specify the basis for payments made from and to the plan, and must have specified procedures for amending the plan, for fixing responsibility for the plan's administration, and for establishing a funding policy that

is consistent with the plan's objectives and the requirements of the statute. 29 U.S.C. 1102(a) and (b). All assets of the plan, except for insurance contracts and policies, must be held in trust. 29 U.S.C. 1103(a) and (b)(1). The plan must have designated fiduciaries who have authority to control and manage the plan. 29 U.S.C. 1102(a)(1). The statute requires the administrator of each plan to report and disclose certain information to the Secretary of Labor and to the participants in the plan, and imposes standards of conduct for fiduciaries with respect to the management of the plan and its assets. 29 U.S.C. (& Supp. IV) 1021-1031, 1104-1113. Welfare plans, however, are not subject to the participation, vesting and funding provisions applicable to pension plans, and the statute does not otherwise regulate the terms or conditions of welfare benefit plans. Welfare plans covered by ERISA may range in character from a simple arrangement controlled exclusively by a single employer, in which the employer purchases insurance to provide a single benefit, to more complicated plans that offer a range of benefits and are jointly administered and controlled with other employers and/or employee organizations. See 29 U.S.C. 1002(1) and (37).

Section 514(a) of ERISA provides that ERISA "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. 1144(a). This broad preemption provision, however, does not cover plans "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." Such plans therefore remain subject to exclusive state regulation. Section 4(b)(3), 29 U.S.C. 1003(b)(3). In addition, while state regulation is gen-

erally preempted, all applicable federal laws are preserved by Section 514(d), which provides that nothing in ERISA "shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States * * *." 29 U.S.C. 1144(d).

2. The two state laws at issue here are New York statutes governing discrimination in employment and the eligibility of employees for cash benefits during periods of disability.

a. The New York Human Rights Law bars sex discrimination in employment, including unequal treatment under disability plans. N.Y. Exec. Law § 296.1 (a) (McKinney Supp. 1972-1981). This state statute has been construed by the New York Court of Appeals to prohibit discrimination based on pregnancy. *Brooklyn Union Gas Co.* v. *New York State Human Rights Appeal Board*, 41 N.Y.2d 84, 359 N.E.2d 393, 390 N.Y.S.2d 884 (1976).[1]

b. The second state statute at issue here, the New York Disability Benefits Law, requires employers to pay benefits to employees unable to work because of non-occupational injuries or illness. N.Y. Work.

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[1] The New York Human Rights Law thus goes further than the original sex discrimination provision in Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000e *et seq.*, which this Court construed as not barring discrimination based on pregnancy. *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976). In enacting the Pregnancy Discrimination Act, effective April 29, 1979, Congress thereafter amended Title VII to prohibit such discrimination. Pub. L. No. 95-555, 92 Stat. 2076-2077 (codified at 42 U.S.C. (Supp. IV) 2000e(k)). As matters now stand, both federal and New York state law prohibit an employer who provides disability benefits to employees from denying benefits to women disabled by pregnancy. The present litigation involving the New York Human Rights Law presents no preemption claim concerning benefits for pregnancy disability occurring after the April 1979 effective date of the Pregnancy Discrimination Act.

Comp. Law § 204.1 (McKinney 1965).[2] Disabled employees are entitled to up to 26 weeks of income replacement at the rate of one-half of weekly wages or $95 per week, whichever is less. N.Y. Work. Comp. Law §§ 204(2) and 205(1) (McKinney Supp. 1981-1982). From 1977 to 1981, employers' liability for pregnancy-related disabilities was limited to eight weeks. 1977 N.Y. Laws ch. 675, § 29. That limitation was removed in 1981 and pregnancy-related disabilities are now treated in the same manner as other disabilities. 1981 N.Y. Laws ch. 352. Employers must secure their obligation to provide benefits under the statute in one of four ways: (1) by purchase of insurance from the publicly administered New York State Insurance Fund; (2) by purchase of private insurance; (3) by acting as a self-insurer, as long as adequate security is posted with the Workers' Compensation Board; or (4) by creating a plan, approved by the Board, that provides benefits at least as favorable as those required by the statute. N.Y. Work. Comp. Law § 211 (McKinney 1965). However the employer chooses to comply, the employer's actions will constitute the establishment or maintenance of an employee welfare benefit plan within the meaning of Section 3(1) of ERISA, since the employer will have a "plan, fund, or program" maintained "through the purchase of insurance or otherwise" for the purpose of providing "benefits in the event of * * * disability." 29 U.S.C. 1002(1).

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[2] New York is one of five states that require employers to provide disability benefits in addition to comprehensive workers' compensation benefits. See R.I. Gen. Laws § 28-39-1 *et seq.* (1956); N.J. Stat. Ann. 43:21-25 *et seq.* (West 1962 & Cum. Supp. 1981-1982); Cal. Unemp. Ins. Code § 2601 *et seq.* (West 1972 & Cum. Supp. 1982); Hawaii Rev. Stat. § 392-1 *et seq.* (1976 & Supp. 1981).

B. Proceedings Below

The appellees in these consolidated cases, a group of airlines, the Burroughs Corporation, and the Metropolitan Life Insurance Company, maintained employee welfare plans that did not provide benefits for employees disabled by pregnancy. Appellees brought separate actions in the United States District Courts for the Southern and Western Districts of New York, for declaratory and injunctive relief against agencies of the State of New York, alleging that ERISA preempts the New York Human Rights Law and Disability Benefits Law.[3]

The district courts enjoined enforcement of the New York Human Rights Law, holding that Section 514(a) of ERISA preempted the application of the law to appellees or to their plans (J.S. App. A74 to A76, A82 to A87, A103 to A104, A107 to A117, A118 to A120). With respect to the New York Disability Benefits Law, which was challenged only in the action brought by the group of airlines, the district court held that the state law was not preempted. It concluded that the portions of the plans dealing with disability were excluded from coverage under ERISA because they were maintained "solely" to comply with a disability insurance law within the meaning of Section 4(b)(3) of ERISA (J.S. App. A74, A88 to A90).

The court of appeals affirmed the district courts with respect to preemption of the New York Human Rights Law (J.S. App. A5 to A12).[4] Relying on the

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[3] Appellee Delta Air Lines, Inc. was the only party to claim that ERISA preempted the New York Disability Benefits Law (J.S. App. A88 to A90).

[4] In its first opinion, the court of appeals had upheld the New York Human Rights Law against the preemption claim on the authorities of two summary dispositions by this Court. In each of those cases, the Court dismissed for want of a

Court's decision in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), which had sustained a preemption claim against the application of a state worker's compensation statute regulating the calculation of pension benefits, the court of appeals held that Section 514(a) was intended to establish employee benefit plan regulation as an exclusively federal concern, except to the extent that the plan itself is exempt from ERISA (J.S. App. A9). "A state statute that eliminates from ERISA-covered employee benefit plans features that are permitted by federal law is preempted" (*ibid.*). Under these principles, the New York Human Rights Law was plainly displaced by ERISA insofar as it regulated "matters that federal law [had at the time] reserved to private choice" (*id.* at A10).

In reaching this conclusion, the court reaffirmed its earlier rejection of the so-called "double savings clause" argument advanced by the state. See *Pervel Industries, Inc.* v. *State of Connecticut Commission on Human Rights & Opportunities*, 603 F.2d 214 (2d Cir. 1979), aff'g 468 F. Supp. 490 (D. Conn. 1978), cert. denied, 444 U.S. 1031 (1980). Under this con-

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substantial federal question appeals from state court decisions upholding indistinguishable fair employment laws against the claim of preemption by ERISA. *Mountain States Telephone & Telegraph Co.* v. *Commissioner*, 445 U.S. 921 (1980), dismissing appeal 608 P.2d 1047 (Mont. 1979); *Minnesota Mining & Manufacturing Co.* v. *Minnesota*, 444 U.S. 1041 (1980), dismissing appeal, 289 N.W.2d 396 (Minn. 1979). Subsequently, the court of appeals granted rehearing because of the intervening decision in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). The court then vacated its prior opinion, concluding that *Alessi* had overruled the two previous cases sub silentio.

tention,[5] Section 514(d), which preserves federal law, would preserve not only the substantive provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000e *et seq.*, but also those Title VII provisions preserving all rights and remedies available under state law, including those providing greater protection. See 42 U.S.C. 2000e-7. The court of appeals, however, concluded that Title VII does not transform such state laws into federal laws, and that "only federal laws are protected from preemption by ERISA" (J.S. App. A12). The court also relied on the legislative history accompanying the Age Discrimination in Employment Act Amendments of 1978 (ADEA), which raised the protected age to 70 years under the ADEA. Pub. L. No. 95-256, 92 Stat. 189. In the debate on these amendments, Senators Javits and Williams agreed that even though the ADEA preserved state age discrimination laws, those laws would not be applicable to plans covered by ERISA. 124 Cong. Rec. 8218-8219 (1978). The court inferred from this legislative history that Congress did not intend that state laws preserved by similar provision of Title VII would be applied to benefit plans subject to ERISA (J.S. App. A11).

As to the New York Disability Benefits Law, the court first concluded that it "relates to" a benefit plan within the meaning of Section 514(a) because "it has a direct bearing on such plans" (J.S. App. A55). As previously noted, however, such a statute is not preempted if it "relates to" a plan which itself is exempted from coverage by ERISA under Section 4(b)

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[5] The "double savings clause" argument had prevailed in *Bucyrus-Erie Co.* v. *Department of Industry, Labor and Human Relations*, 599 F.2d 205 (7th Cir. 1979), cert. denied, 444 U.S. 1031 (1980); *Minnesota Mining & Manufacturing Co.* v. *Minnesota, supra*; and *Mountain States Telephone & Telegraph Co.* v. *Commissioner, supra.*

(3) as one "maintained solely for the purpose of complying with applicable * * * disability insurance laws." The court concluded that this exemption can apply only to a plan as an integral unit rather than to particular provisions of a plan. Thus, in the court's view, state regulation could apply only to a disability plan that is constituted as a separate administrative unit (J.S. App. A58 to A59, A63 to A65). Where an employer provides a multi-benefit program in a single administrative unit, the court reasoned that the potential for piecemeal regulation of individual types of benefits and the potentially conflicting requirements of the various states would be contrary to the purpose of ERISA and Congress' intent in enacting the broad preemption provision of Section 514(a) (J.S. App. A57 to A59).

In determining whether an employer maintained a plan "solely" for purposes of complying with state law, the court rejected a motive test that would inquire whether the employer would have provided the benefits in the absence of state law requirements (J.S. App. A65). If an employer's plan includes benefits in addition to the disability benefits required by the state law, the court ruled, then the Disability Benefits Law is "preempted in its entirety with respect to such [employers], and * * * wholly unenforceable against them" (*id.* at A66; footnote omitted). The court noted that its holding would not preclude a state from requiring employers to comply with these statutes by creating separately administered plans (*id.* at A66 n.29). Because the nature of the specific plans at issue here was not apparent on the face of the pleadings, the court remanded the cases for further proceedings to determine which, if any, plans might be exempt from ERISA and thus subject to state law (*id.* at A65 to A66).

SUMMARY OF ARGUMENT

1. The court of appeals correctly held that Section 514(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1144(a), preempts the New York Human Rights Law, which prescribes the terms and conditions of ERISA-covered welfare plans by prohibiting the denial of employee disability benefits based on pregnancy. It is clear that the New York law "relates to" ERISA-covered plans within the meaning of the broad preemption provision. As this Court recognized in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981), Congress intended in Section 514(a) to occupy the field of plan regulation to the exclusion of the states, in order to foster the development of benefit plans by relieving employers of potentially conflicting state requirements.

The New York law is not saved from preemption by Section 514(d), which provides that ERISA shall not alter, modify, impair or supersede "any law of the United States." New York argues that its Human Rights Law is a state anti-discrimination law that is preserved by Title VII of the Civil Rights Act of 1964, which is in turn protected by Section 514(d). Before passage of the federal Pregnancy Discrimination Act, 41 U.S.C. (Supp. IV) 2000e(k), however, an employer providing disability benefits to all employees except those disabled by pregnancy did not violate federal law, which is all that Section 514(d) preserves from ERISA preemption. Section 514(d) cannot logically be read to incorporate Title VII's general policy of allowing states to regulate employment practices left untouched by the Civil Rights Act of 1964. While Congress designed a complementary federal-state enforcement scheme in the employment discrimination field, it determined to impose only

federal standards with respect to the more specific question of regulation of employee benefit plans.

2. The court of appeals also correctly held that New York's Disability Benefits Law, which prescribes minimum plan benefits for non-occupationally related disabilities, "relates to" ERISA-covered plans within the meaning of Section 514(a). Moreover, the court correctly construed Section 4(b)(3), which exempts from ERISA coverage any plan "maintained solely for the purpose of complying with applicable * * * disability insurance laws," as exempting only disability plans that are constituted as separate administrative units. New York argues that, when an employer provides multiple benefits in a single plan, that *portion* of the plan providing disability benefits required by state law is saved from preemption by Section 4(b)(3). But this argument conflicts with the plain meaning of Section 4(b)(3), which speaks of a "plan," rather than a "portion of a plan," Moreover, the piecemeal state and federal regulation of parts of a single plan that New York proposes would disrupt the uniformity that Congress intended in enacting ERISA. Indeed, this Court rejected an almost identical contention in *Alessi* v. *Raybestos-Manhattan, Inc.*, *supra*, 451 U.S. at 523-524 n.20.

The court below, however, overstated the matter when it declared that New York could not enforce its Disability Benefits Law at all against an employer who provides disability benefits as part of a multi-benefit plan. Such a result would allow employers to avoid the requirements of many state laws Congress intended to preserve in Section 4(b)(3), merely by establishing a multi-benefit plan. In our view, a state law of the type listed in Section 4(b)(3), like New York's Disability Benefits Law, would always be enforceable against an employer. An employer would

have to satisfy local authorities that it had complied with state law requirements, either through a separately-administered plan excluded from ERISA coverage under Section 4(b)(3), or, if the state permits, through a multi-benefit plan covered in whole by ERISA. If an employer chooses to utilize a multi-benefit plan to comply with state law, the employer would provide the information the state needs to determine whether the plan meets state requirements. If the plan does not meet the state's requirements, the state could not impose changes upon the ERISA plan, but could require the employer to establish a separately administered plan.

ARGUMENT

I. SECTION 514(a) OF ERISA PREEMPTS THE NEW YORK HUMAN RIGHTS LAW, WHICH SEEKS TO REGULATE THE TERMS AND CONDITIONS OF ERISA-COVERED PLANS BY PROHIBITING THE DENIAL OF DISABILITY BENEFITS FOR PREGNANCY

As this Court recognized in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981), ERISA rests upon an expansive principle of federal preemption of state law. In broad language, Section 514(a) of ERISA preempts all state laws insofar as they "relate to any employee benefit plan" covered by ERISA.[6] The court below correctly concluded that New York's Human Rights Law, which prohibits the practice of

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[6] In this respect, ERISA differs from its predecessor statute, the Welfare and Pension Plans Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997, 29 U.S.C. 301 *et seq.*, which had generally allowed concurrent state regulation of plans. See *Malone* v. *White Motor Corp.*, 435 U.S. 497, 505 (1978).

denying disability benefits to pregnant employees, "relates to" a plan, within the plain meaning of Section 514(a). It is therefore clear that Congress intended to preempt state statutes like the Human Rights Law, which would operate to prescribe the terms and conditions of an ERISA-covered plan.[7] As this Court observed in *Alessi*, Congress "meant to establish * * * plan regulation as exclusively a federal concern" (451 U.S. at 523).[8] Just as the state workers' compensation law in *Alessi* "related to" covered plans by "eliminat[ing] one method for calculating pension benefits * * * that is permitted by federal law" (*id.* at 524), the New York Human Rights Law "relates to" plans by eliminating a method of dealing with pregnancy disability that had been permitted under the federal anti-discrimination law. As in *Alessi*, "[i]t is of no moment that the [state law] intrudes indirectly" through a general anti-discrimination statute rather than directly through a statute called an "employee benefit plan regulation." See *id.* at 525. The statute itself defines a preempted state agency as including one "which purports to regulate, *directly or indirectly*, the terms and conditions of employee benefit plans * * *." 29 U.S.C. 1144(c)(2)

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[7] ERISA preempts such laws only as they "relate" to ERISA-covered plans, not as they operate to prohibit discriminatory practices generally. For example, New York's Human Rights Law would continue to prohibit pregnancy discrimination with respect to any other terms or conditions of employment, such as hiring, dismissal, promotion, or salary.

[8] Because Section 514(a) draws no distinction between pension plans and welfare benefit plans, the preemption principles of Section 514(a), as construed by *Alessi*, apply equally to this case.

(emphasis added).[9] Hence, New York's attempt (Br. 34-36 to distinguish *Alessi* is unavailing.

Moreover, the legislative history of Section 514(a) confirms Congress' intent to occupy the field of plan regulation to the exclusion of the states. Sensitive to the fact that the private benefit plan system is voluntary on the part of employers, Congress determined to lessen the disruptive effect of the new federal law by saving plans from possibly inconsistent or duplicative state laws. As the court of appeals noted, earlier Senate and House versions of the legislation each contained language which appeared to limit ERISA's preemption to contrary or inconsistent state law, leaving the states to regulate where ERISA did not (J.S. App. A54). See 120 Cong. Rec. 5002 (Senate version), 4742 (House version) (1974). Both versions were rejected in conference and the present broad language of Section 514(a) was substituted. H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 383 (1974). The explanations for the change by the House and Senate conferees all stated that the purpose of the broad preemption provision was to reserve sole authority in the federal government to regulate benefit plans covered by the statute. 120 Cong. Rec. 29197 (1974) (remarks of Rep. Dent); *id.* at 29933 (remarks of Sen. Williams); *id.* at 29942 (remarks of Sen. Javits). Senator Javits, one of the principal sponsors of the legislation, explicitly affirmed Congress' intent to occupy the field completely, while acknowledging that the consequences might often

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[9] As in *Alessi*, the plans here apparently emerged from collective bargaining so that "the additional federal interest in precluding state interference with labor-management negotiations calls for pre-emption of state efforts to regulate [plan] terms." 451 U.S. at 525 (citations omitted).

mean no substantive regulation at all. As he stated (120 Cong. Rec. 29942 (1974)):

> Although the desirability of further regulation —at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs. The conferees—recognizing the dimensions of such a policy—also agreed to assign the Congressional Pension Task Force the responsibility of studying and evaluating preemption * * *. If it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modifications can be made.

And it is significant that Congress thus far has rejected proposals to cut back on the scope of federal preemption. See *Oversight on ERISA, 1978: Hearings before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 95th Cong., 2d Sess. 521-686 (1978).

Here, it is indisputable that the New York Human Rights Law, which imposes conditions on the administration and distribution of plan benefits, is a state law that relates to benefit plans within the meaning of Section 514(a). Indeed, appellants do not seriously contend otherwise. Instead, they rely primarily on another provision of ERISA, which they claim "saves" this particular state law from preemption. Thus, New York argues (Br. 20-21) that its Human Rights Law survives the broad preemption principle of Section 514(a) by operation of Section 514(d), which declares that ERISA shall not "alter,

amend, modify, invalidate, impair, or supersede any law of the United States." Under this "double savings clause" argument, New York claims that its Human Rights Law is protected by Title VII of the Civil Rights Act of 1964 and its provision preserving state anti-discrimination laws. See 42 U.S.C. 2000e-7.

But this argument overlooks the simple fact that a violation of a state human rights statute is not a violation of federal law, which is all that Section 514(d) preserves. Indeed, New York's entire argument (Br. 20-23) rests upon the fact that Title VII preserves the substantive effect of state fair employment laws and requires recourse to available state remedies. It accordingly argues that Title VII "integrates state fair employment laws and procedures into the federal enforcement scheme" (Br. 22). The cases on which it relies for this proposition,[10] however, all involve employment practices that are prohibited by both federal and state laws. They do not suggest that Title VII would in any way be "impaired" by ERISA's preemption of state laws that prohibit practices allowed by Title VII. That is the situation presented in this case. Before passage of the Pregnancy Discrimination Act, an employer did not violate Title VII of the Civil Rights Act of 1964 by providing disability benefits to all employees except those disabled by pregnancy. While such conduct may have violated a particular state equal employment opportunity law, it remained permissible under federal law. Section 514(d) provides that ERISA does not "alter, amend, modify, invalidate, impair, or supersede *any law of the United States*" (emphasis added). Ac-

[10] *E.g.*, *Kremer* v. *Chemical Construction Corp.*, No. 80-6045 (May 17, 1982); *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980); *Love* v. *Pullman Co.*, 404 U.S. 522 (1972).

cordingly, Title VII is not preempted by ERISA; the terms and conditions of ERISA-covered plans must comply with the federal Civil Rights Act of 1964.[11]

The deference Section 514(d) affords federal statutes cannot logically be read to incorporate Title VII's general policy of allowing states to regulate employment practices left untouched by the Civil Rights Act of 1964. In enacting Section 514(d), Congress cannot be deemed to have incorporated into the body of federal law a host of state laws, many of which may well be contrary to federal law.

Title VII permits the states to continue to prohibit discrimination in employment that the federal statute does not address because Congress determined that a complementary federal-state scheme was generally appropriate in that field and would encourage the resolution of some employment discrimination claims without the need for invoking federal processes. But Congress consciously and deliberately determined to impose federal standards with respect to the more specific question of regulation of employee benefit

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[11] The preemption issue presented in this case involves claims arising from employment practices antedating the amendment of Title VII in February 1979. Because the practices at issue here are now illegal as a matter of federal, as well as state, law, the parties did not directly argue the question of preemption of the New York law after the effective date of the Pregnancy Discrimination Act. New York now assumes (Br. 21-36) that state laws prohibiting practices also barred by Title VII continue to operate under the "state deferral" procedures of Title VII, which require resort to state agencies before pursuit of federal remedies. See 42 U.S.C. 2000e-5(c). But this case does not present the question whether "state deferral" procedures under Title VII are applicable to claims against ERISA-covered plans where the practices are barred by both federal and state law, and the Court need not reach it.

plans under ERISA. To that end, Congress chose to preempt state laws affecting plans, even though it recognized that many such laws were meritorious. Balancing the interests involved, Congress chose to eliminate state regulation touching on ERISA-covered plans in order to achieve nation-wide uniformity. It thereby determined that the policy encouraging employers to participate in the establishment and maintenance of pension and welfare plans by protecting such plans from conflicting state regulation should prevail over the admittedly legitimate interests of the states in enacting their statutes.

Moreover, Congress specifically addressed the question of which state laws could continue to operate as to plans. It exempted state insurance, banking and investment regulation, and general criminal laws from ERISA's broad preemption provision. See Section 514(b)(2) and (4), 29 U.S.C. 1144(b)(2) and (4). And it excluded altogether from ERISA coverage plans maintained solely to comply with three specified categories of state law. See Section 4(b)(3), 29 U.S.C. 1003(b)(3), and discussion pages 21-25, *infra*. Congress made no accommodation, however, for state regulation of human rights or fair employment practices, as they related to plans, although it was unquestionably familiar with local laws dealing with that subject.[12]

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[12] The only relevant legislative history on this point is that relied on by the court below (J.S. App. A11). The principal sponsors of ERISA, Senators Javits and Williams, when discussing amendments to the Age Discrimination in Employment Act in 1978, stated that a "double savings clause" interpretation of ERISA and the ADEA could not be used to preserve state age discrimination laws relating to plans. 124 Cong. Rec. 8218-8219 (1978). To be sure, the views of a subsequent Congress cannot be attributed to a previous Congress

Contrary to New York's argument (Br. 30-33), there is nothing in the legislative history of ERISA to suggest that Congress intended to preserve state fair employment laws as they relate to ERISA-covered plans. The legislative history simply demonstrates the undisputed proposition that discrimination that is prohibited by Title VII would be prohibited under ERISA, by virtue of Section 514(d). There was no reference to any state discrimination laws, either those identical to Title VII or those prohibiting conduct allowed under Title VII. Accordingly, the court below correctly concluded that the specific congressional intent in Section 514(a) to terminate state regulation of ERISA-covered plans preempts the New York Human Rights Law insofar as it prohibits

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in determining legislative intent. See *United States* v. *Price*, 361 U.S. 304, 313 (1960). See also *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348-349 (1963); *Waterman Steamship Corp.* v. *United States*, 381 U.S. 252, 269 (1965); *United States* v. *W.M. Webb, Inc.*, 397 U.S. 179, 194 n.21 (1970); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968); *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958); *United States* v. *United Mine Workers*, 330 U.S. 258, 280-282 (1947).

Thus, while this subsequent legislative history is not conclusive, it does lend support to the proposition that Congress did not intend state human rights legislation to apply to ERISA-covered plans. The legislative history of the Pregnancy Discrimination Act does not undermine this conclusion. Both the Senate and House reports accompanying that legislation discuss the projected impact on employers of the amendment on the assumption that state anti-discrimination laws that protected pregnant women were already applicable. S. Rep. No. 95-331, 95th Cong., 1st Sess. 3 n.1, 10-11 (1977); H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 10-11 (1978). But there was no discussion of whether ERISA plans had been or would continue to be subject to state fair employment laws.

the denial of disability benefits for pregnancy prior to the effective date of the Pregnancy Discrimination Act.

II. SECTION 514(a) OF ERISA PREEMPTS THE NEW YORK DISABILITY BENEFITS LAW AS IT RELATES TO ERISA-COVERED PLANS; HOWEVER, NEW YORK MAY ENFORCE ITS DISABILITY BENEFITS LAW AGAINST EMPLOYERS AND REQUIRE COMPLIANCE THROUGH SEPARATELY ADMINISTERED PLANS EXEMPT FROM ERISA COVERAGE UNDER SECTION 4(b)(3)

Section 514(a) preempts only state laws that "relate to" plans covered by ERISA. Hence it must be read in conjunction with Section 4(b)(3), which excludes certain categories of plans from ERISA coverage. Specifically, Section 4(b)(3) exempts plans "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." Accordingly, such plans remain subject to exclusive state regulation.

The court below correctly ruled that the New York Disability Benefits Law "relates to" employee welfare plans within the meaning of Section 514(a). Moreover, it correctly rejected New York's argument (Br. 39-40) that, in an ERISA-covered plan providing multiple benefits, *any portion* of that plan providing disability benefits required by the New York law is excluded from federal coverage and therefore subject to state regulation. As the court concluded, only a separately administered disability benefits plan is excluded from ERISA coverage as one "maintained solely to comply" with the New York Disability Benefits Law. The court stated, however, that when employers maintain complex benefits systems without

providing a separate plan for disability, the New York Disability Benefits Law "is preempted in its entirety with respect to such [employers], and is wholly unenforceable against them" (J.S. App. A66).

In our view, New York can enforce its disability insurance statute—which is one of the types of laws listed in Section 4(b)(3)—against any employer, whether or not the employer uses a multi-benefit plan covered by ERISA. As the court of appeals carefully pointed out, New York could always "require employers to administer disability benefits through a separate 'plan,' " which would unquestionably be exempt from ERISA under Section 4(b)(3) (J.S. App. A66 n.29). The fact that the New York statute allows employers to satisfy the state's disability benefits law through multi-benefit plans covered by ERISA does not, in our view, mean that the New York statute thereby becomes preempted in its entirety and is "wholly unenforceable" against the employers, as the court of appeals stated (*id.* at A66). Although the New York statute is unenforceable against the *plan*, the New York authorities may hold the *employer* responsible for complying with the state disability benefits law since there is available a plan structure that would be excluded from ERISA coverage. If the state is not satisfied that an employer's multi-benefit plan meets the requirements of the disability benefits law, it could apply sanctions against the employer, although it could not require changes in the ERISA-covered plan.

A. Section 4(b)(3) excludes from ERISA coverage only entire plans, and not portions of plans, that are maintained solely to comply with the Disability Benefits Law

The court below correctly concluded that the Disability Benefits Law, which prescribes minimum plan benefits for non-occupationally related disabilities,

"relates to" welfare benefit plans within the plain meaning of Section 514(a). New York does not challenge this conclusion, but seeks to escape the preemptive effect of Section 514(a) by relying on the exclusion in Section 4(b)(3) for any "plan" that is "maintained solely for the purpose of complying with [state] * * * disability insurance laws." New York argues (Br. 39-40) that those portions of a plan providing benefits required by the disability benefits law are excluded from ERISA coverage and thus subject to state regulation. As New York sees the matter, any other benefits within the same plan, whether of a different nature or in excess of the disability benefits required by state law, would not fall within the exclusion of Section 4(b)(3) and therefore would be covered exclusively by ERISA.

The court of appeals correctly rejected New York's contention, which comports with neither the language of the statute nor the legislative intent. Section 4(b)(3) excludes from coverage only a "plan"; it does not exclude "a plan or portions thereof." Nor can the administration of a particular type of benefit be regarded as an individual plan in any sense; the statutory definition of a welfare plan makes it clear that a *single* plan may provide for any number of different benefits. See 29 U.S.C. 1002(1). Furthermore, Section 4(b)(3) exempts only plans that are maintained "solely" to comply with state law. The term "solely" indicates that exempted plans must be exclusive or unitary, whether in purpose or in structure.[13] New

[13] The court of appeals used a purely structural test to determine whether a plan was maintained "solely" to comply with state law. The court properly rejected the airlines' contention that the test should turn on the employer's subjective motive for providing disability benefits, *i.e.*, whether the employer's only reason for providing such benefits was its desire to comply with state law rather than for reasons of altruism

York's construction, which would exempt a portion of a multi-benefit plan serving various purposes, would render the qualfying term "solely" meaningless. Complex plans providing a variety of benefits in addition to disability benefits, and serving multiple employee needs, are not, under any stretch of the imagination, maintained "solely" to comply with New York's Disability Benefits Law.

Moreover, New York's aberrant construction of Section 4(a)(3) is all but precluded by this Court's opinion in *Alessi*. There, the Court specifically rejected an argument that a provision in a state workers' compensation statute was saved from preemption by Section 4(b)(3), which excludes such laws as well as disability insurance laws, from ERISA coverage. The Court reasoned that a plan that serves a variety of purposes cannot be maintained "solely" to comply with state law. As the Court stated (451 U.S. at 523-524 n.20 (emphasis supplied)):

> The only relevant state laws, or portions thereof, that survive th[e] preemption provision are those relating to plans that are themselves exempted from ERISA's scope. *And the relevant exemption from ERISA's coverage—for plans maintained solely for compliance with state workers' compensation laws—has no bearing on the plans involved here, which more broadly serve employee needs as a result of collective bargaining.* As [the] retirees do not, and cannot, claim that the plans involved here are free from ERISA's coverage, they cannot claim the exception to preemption restricted to laws governing such exempted plans.

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or collective bargaining. As the court pointed out, the problem with a subjective test is that any employer "could credibly claim that it had adopted a disability plan in order to attract and keep good employees, smooth labor relations, and the like" (J.S. App. A65).

Under the Court's reasoning, multi-benefit plans, which by definition "broadly serve employee needs," as a result of collective bargaining or otherwise, cannot be held to exist "solely" to comply with the Disability Benefits Law as New York asserts.

The court of appeals correctly concluded that New York's proposed construction would conflict with Congress' intent in enacting ERISA by subjecting a single plan to both federal and individual state regulation, thereby disrupting the uniformity that Congress intended, particularly for employers and plans operating in more than one state (see pages 14-15, *supra*; J.S. App. A59).[14] Under New York State's reading of the statute, a single plan could be subject to the administrative burden of treating the claims of employees in one state differently from those in another. As the court below noted, for a nationwide employer with a multi-benefit plan, disability benefits "might be subject to New York's [Disability Benefits Law], yet also subject to ERISA requirements in states without 'applicable * * * disability insurance law,' and subject to further, and probably conflicting, requirements imposed by other states that do have such laws" (J.S. App. A59). The court of appeals correctly concluded that Congress "could scarcely have intended to permit such successive layers of regulations to be imposed on certain portions of a plan otherwise subject in its entirety to ERISA alone" (*ibid.*).

Finally, it is simply not practical or desirable to subdivide ERISA's requirements, partially excluding

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[14] There is no specific legislative history to explain what Congress meant by a "plan" maintained "solely" to comply with applicable law. The language in Section 4(b)(3) was adopted from the former Welfare Pension Plans and Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997. There had been no judicial interpretation of the language under the earlier statute.

federal authority over a plan based on the nature of the benefits provided. For example, the fiduciary obligation imposed by ERISA must extend to transactions concerning the assets of a plan in order for the statute to achieve its purpose of protecting the interests of plan beneficiaries. A construction of the statute that carves up a single plan into areas of mutually exclusive state and federal jurisdiction can only create confusion and uncertainty as to the fiduciaries' obligations under ERISA. New York's construction of Section 4(b)(3), therefore, cannot be reconciled with the statutory scheme, which contemplates a single set of federal obligations for an integrated plan.

B. New York may enforce its Disability Benefits Law by requiring employers to establish separately-administered plans exempt from ERISA coverage under Section 4(b)(3)

As we have discussed (pages 21-25, *supra*), the court of appeals correctly held that only separately-administered disability plans are exempt from ERISA coverage under Section 4(b)(3) as maintained "solely" to comply with the New York Disability Benefits Law. A state may not carve out that portion of a multi-benefit plan that deals with disability benefits and regulate that part of the plan to the exclusion of federal regulation under ERISA. In so holding, the court correctly noted that a state could require employers to administer disability benefits through a separate plan that would be exempt from ERISA under Section 4(b)(3) (J.S. App. A66 n.29).

But where a state, like New York, allows an employer the option of using a multi-benefit plan, and the employer in fact has such a plan, the court of appeals declared that the state law "is preempted in its entirety with respect to such [employers], and is wholly unenforceable against them" (J.S. App. A66).

We believe this observation by the court of appeals mistakenly overstates the effect of the preemption by ERISA. Indeed, if it is taken at face value, it would create unacceptable consequences for the operation of the types of state laws listed in Section 4(b)(3), and would be contrary to Congress' intent to preserve such laws.

New York currently allows an employer to comply with a type of law listed in Section 4(b)(3) through a complex plan including other benefits outside the scope of the worker's compensation, disability insurance, or unemployment insurance statutes listed. See N.Y. Work. Comp. Law § 355.6 App., at 149 (McKinney Supp. 1981-1982). The court stated that if an employer creates a multi-benefit plan containing disability benefits and administers or insures it as a single unit, a state cannot in any manner enforce against an employer any state law that purports to regulate the type, amount, and manner in which the employer's disability or workers' compensation benefits are paid.

The decision thus suggests a device by which employers might escape the operation of a significant number of state disability insurance and workers' compensation laws as presently written.[15] In addition to the five states that require disability benefits, all the states have workers' compensation laws, and 48 states permit an employer to provide these benefits

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[15] Although unemployment insurance laws are also included in the Section 4(b)(3) exclusion, the decision does not pose the same problem for such statutes. Pursuant to the Federal Unemployment Tax Act, 26 U.S.C. 3304(a)(1), all state unemployment compensation laws must provide that only state agencies may administer the benefit program, as a condition for receipt of a federal tax credit. Under the lower court's analysis, therefore, each employer's plan would be exempt under Section 4(b)(3) as one maintained "solely" to comply with state law (see J.S. App. A60 to A62).

through the purchase of insurance or a program of self-insurance. 4 A. Larson, *The Law of Workmen's Compensation* § 92.10 & App. A, Table 7 (1982). An employer who follows such a course has undoubtedly established an employee benefit plan within the meaning of Section 3(1) of the ERISA, 29 U.S.C. 1002(1). Presumably, most state laws, like the New York Disability Benefits Law, would permit an employer to insure or administer the workers' compensation or disability aspects together with other benefits such as general health coverage. Since such a multi-benefit plan would not be maintained "solely" to comply with the workers' compensation or disability insurance law, it would not be exempt from ERISA under Section 4(b)(3).

Under the court of appeals' reasoning, the state law would be preempted and completely unenforceable against the employer (see J.S. App. A61 to A64). It might therefore be possible for resourceful employers to immunize themselves from the precise requirements of state workers' compensation and disability insurance laws by combining these categories of benefits into a plan with other types of benefits. It might be open to an employer to pay benefits inferior to those required by state law, with impunity. It is unreasonable to impute to Congress an intent to permit such an expedient means to avoid compliance with longstanding state laws governing compensation for occupationally-related accidents and illness or for disabilities generally. To the contrary, in enacting Section 4(b)(3), Congress intended that these state social insurance laws would continue to play a role after the enactment of ERISA; it did not, we submit, intend to displace such laws.

In our view, a state law of the type listed in Section 4(b)(3) is always enforceable against an employer. An employer would have to satisfy local authorities

that it had complied with state law requirements, either through a separately-administered plan excluded from ERISA coverage under Section 4(b)(3) or, if the state allowed, through a multi-benefit plan covered in whole by ERISA. Thus, a state disability insurance law allowing an employer to use a multi-benefit plan would not be "wholly unenforceable" against *employers* using such a plan, as the court of appeals stated, although the state law could not regulate the *plan* as a means of enforcement. The state's interests can be accommodated while protecting the ERISA-covered multi-benefit plan from state interference, in accordance with the policy of the preemption provision.

An employer choosing to comply with the state law through a multi-benefit plan would simply furnish relevant information to the state authorities, who could then determine whether the ERISA-covered plan complied with state requirements. If so, the state would be satisfied. If not, the state could not prescribe the terms and conditions for or in any way regulate the multi-benefit plan, or interfere in the administration of benefits under that ERISA-covered plan. But the state could bring its legal sanctions to bear on any employer who violates any aspect of state law, for example, by failing to provide requisite proof of financial security or failing to pay required benefits. An employer with a multi-benefit plan that did not satisfy state requirements could avoid state sanctions, of course, by establishing a separately-administered plan "solely" to comply with state law, which by definition would be excluded from ERISA coverage under Section 4(b)(3). This construction of Sections 514(a) and 4(b)(3), we submit, would best accommodate Congress' intent to preserve disability insurance, unemployment insurance, and workers' com-

pensation laws, while protecting ERISA-covered plans.[16]

In sum, the decision below correctly held that the New York Disability Benefits Law is preempted as it relates to the regulation of ERISA-covered multi-benefit plans. The court of appeals was mistaken only in stating that New York cannot enforce its Disability Benefits Law against employers using a multi-benefit plan. The New York Disability Benefits Law is enforceable against all employers regardless of the nature of their disability program. Hence, there is

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[16] The same result would not obtain, however, as to state laws other than those that Congress designated for special treatment under Section 4(b)(3). When states seek to require employers to provide benefits other than the three types listed in the Section 4(b)(3) exclusion, employers can comply only through an ERISA-covered plan. The federal statute would provide no means for compliance with the state law through any action that would not constitute an ERISA "plan," so the state law would necessarily be preempted as relating to a federally-covered plan within the meaning of Section 514(a). For example, state laws that require employers to provide health benefits are preempted by ERISA. *Standard Oil Co.* v. *Agsalud*, 442 F. Supp. 695 (N.D. Cal. 1977), aff'd, 633 F.2d 760 (9th Cir. 1980), aff'd, 454 U.S. 801 (1981); *Hewlett-Packard Co.* v. *Barnes*, 425 F. Supp. 1294 (N.D. Cal. 1977), aff'd, 571 F.2d 502 (9th Cir.), cert. denied, 439 U.S. 831 (1978). Such laws would require an employer either to establish a separate plan—which would be covered by the federal statute—or change the terms and conditions of an existing ERISA plan. In either event, Congress intended this type of state regulation to be preempted under Section 514(a), because it was accorded no protection under the Section 4(b)(3) exclusion. The New York Human Rights Law is a type of state law with respect to which ERISA affords no special treatment. It is preempted as relating to an ERISA-covered plan, whenever it would operate to prescribe the terms and conditions of such a plan.

no need for the remand ordered by the court of appeals to permit appellees "to show the nature of its disability program" (J.S. App. A66). This Court should therefore clarify that New York can enforce its disability benefits statute against any employer maintaining an ERISA-covered multi-benefit plan by requiring it to establish a separately-administered plan that falls outside the scope of ERISA.

CONCLUSION

The judgment of the court of appeals should be affirmed. The remand instructions of the court of appeals should be modified to reinstate the district court's dismissal of Delta Air Lines' claim that ERISA preempts the New York Disability Benefits Law.[17]

Respectfully submitted.

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AUGUST 1982

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[17] As we have noted (page 6 note 3), appellee Delta Airlines, Inc., was the only party to claim that ERISA preempted the New York Disability Law.

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Reply Brief

1

No. 81-1578

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IN THE

Supreme Court of the United States

October Term, 1981

WERNER H. KRAMARSKY, Individually and in his capacity as Commissioner of the New York State Division of Human Rights; ANN THACHER ANDERSON, Individually and in her capacity as General Counsel of the New York State Division of Human Rights; the NEW YORK STATE DIVISION OF HUMAN RIGHTS, an agency of the Executive Department of the State of New York; WILLIAM B. KROEGER, Individually and in his capacity as Chairman of the New York State Workers' Compensation Board; and the NEW YORK STATE WORKERS' COMPENSATION BOARD,

Appellants,

against

DELTA AIR LINES, INC., U.S. AIR, INC., PIEDMONT AVIATION, INC., BRANIFF AIRWAYS, INC., REPUBLIC AIRLINES, INC., EASTERN AIR LINES, INC., NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., OZARK AIR LINES, INC., AMERICAN AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., and UNITED AIR LINES, INC.,

Appellees.

WERNER H. KRAMARSKY, As Commissioner of the New York State Division of Human Rights,

Appellant,

against

BURROUGHS CORPORATION,

Appellee.

WERNER H. KRAMARSKY, As Commissioner of the New York State Division of Human Rights, the NEW YORK STATE DIVISION OF HUMAN RIGHTS, and the NEW YORK STATE HUMAN RIGHTS APPEAL BOARD,

Appellants,

against

METROPOLITAN LIFE INSURANCE COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Second Circuit

---

RESPONSE OF APPELLEE AIRLINES TO MOTION UNDER RULE 38.4 FOR DIVIDED ARGUMENT

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No. 81-1578

IN THE

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Appellee.

On Appeal from the United States Court of Appeals for the Second Circuit

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RESPONSE OF APPELLEE AIRLINES TO MOTION UNDER RULE 38.4 FOR DIVIDED ARGUMENT

On July 8, 1982, Delta Air Lines, Inc. et al.,* (hereinafter called the "Airlines") received, through their counsel, a document entitled "Motion Under Rule 38.4 for Divided Argument." The document was prepared by Ann Thacher Anderson, General Counsel State Division of Human Rights, who is named on the Motion as "Counsel for Appellants Kramar-

sky, Anderson and Division of Human Rights." With this document counsel received another document entitled "Joint Appendix." The following day, the Airlines' counsel received copies of an additional document denominated "Brief for Appellants Kramarsky, Anderson and State Division of Human Rights."

Previously, on July 2, 1982 the Airlines, through their counsel, had received two documents prepared under the name of Robert Abrams, Attorney General for the State of New York, designated variously as "Attorney for Appellants" and "Counsel for Appellants." These two documents were entitled "Brief for Appellants" and "Joint Appendix." While both of the documents denominated "Joint Appendix" bear the name of the law firm serving as counsel for the Airlines, counsel for the Airlines never authorized and, in correspondence, specifically opposed the submission of two joint appendices to this Court.

The Motion submitted under the signature of Ms. Anderson makes two requests: that argument on behalf of appellants Kramarsky, Anderson and the State Division of Human Rights be divided and that the Brief and Joint Appendix submitted under her name be accepted for filing.

The Airlines do not presume to know and express no opinion as to who may properly serve as counsel for the three appellants involved and in light of the apparent dispute over this matter reflected by the Motion and the letter from Mr. Peter Bienstock to the Clerk of this Court (Exhibit A to the Motion), the Airlines take no position on the request for divided argument.

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*Pursuant to Supreme Court Rule 28.1, a listing of all parents, affiliates, and subsidiaries of the appellee Airlines is set forth in the footnote appearing on page 1 of the Motion of Appellee Airlinees to Affirm or Dismiss.

The Airlines, however, do oppose any resolution of the second request contained in the Motion which would permit the acceptance for filing of two briefs on behalf of appellants Kramarsky, Anderson and the State Division of Human Rights for several reasons.

First, the Rules of this Court do not contemplate the filing of two principal briefs on behalf of any party. *See* Rule 35.1. Second, the arguments presented on behalf of Kramarsky, Anderson and the State Division of Human Rights in the two briefs total approximately sixty nine (69) pages thereby violating Rule 34.3, which limits a principal brief to fifty (50) pages in length.

The Airlines' principal reason for opposing the request to accept both briefs for filing, however, is that the two briefs appear to present inconsistent arguments relating to the same issues and the Airlines are therefore uncertain as to which arguments a response is due. The Airlines believe that they are entitled to face one set of counsel with one set of arguments for an opposing party before this Court. The Airlines have no opinion and do not deem it appropriate to take a position as to which is the proper brief for the group of appellants involved, but do request that the Motion be resolved in such a fashion and in such time as to allow the Airlines to respond to one brief and to one set of arguments.

Respectfully submitted,

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Reply Brief

2

No. 81-1578

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WERNER H. KRAMARSKY, *etc.*,
Appellant,

v.

BURROUGHS CORPORATION,
Appellee.

WERNER H. KRAMARSKY, *etc., et al.*,
Appellants,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Second Circuit

---

REPLY OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS TO THE RESPONSE OF THE ATTORNEY GENERAL TO THE DIVISION'S MOTION UNDER RULE 38.4

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No. 81-1578

IN THE

Supreme Court of the United States

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WERNER H. KRAMARSKY, *etc., et al.*,
Appellants,

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METROPOLITAN LIFE INSURANCE COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Second Circuit

---

REPLY OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS TO THE RESPONSE OF THE ATTORNEY GENERAL TO THE DIVISION'S MOTION UNDER RULE 38.4

Appellants Kramarsky, Anderson and State Division of Human Rights ("the Division") submit the following reply to the response of the Attorney General of the State of New York to their motion for divided argument:

Contrary to that response,* this Court is not constrained to deny the motion, but retains discretion. The Attorney General in his response has invited this Court to consider propositions of state law not yet passed upon by the New York Court of Appeals, concerning the interaction of his powers, statutorily granted, with the powers of the constitutional Chief Executive of the State of New York, of whose office the Division is a part. This Court may prefer to exercise its discretion by considering instead whether divided argument would be of assistance in clarifying issues in these particular cases.

The cases at bar arose from orders issued under the Human Rights Law ("HRL") by the Division pursuant to its statutory quasi-judicial power; at issue is the intersection of ERISA not only with the HRL but more specifically with those orders. The Attorney General plays no part in exercising the Division's adjudicatory power, has offered to this Court no written argument as to the Division's practice in adjudicating or settling cases, and cannot be expected to show how widely or narrowly the Division's orders diverge from the essentially fiduciary provisions of ERISA here relevant. While the Attorney General can address the constitutionality of the HRL despite subsection

* Two misstatements in the response require correction: (1) the docketing fee was paid by appellant Kramarsky; (2) his approval from the Governor's office was obtained from the Secretary to the Governor on behalf of the Governor and on notice to the Governor's Counsel.

(a) of the pre-emption clause in ERISA, the Division can more readily describe its procedure, practice and standard directives, thus helping this Court to determine the integrity of the Division's orders under subsections (a) and (c) of that law.

In opposing the Division's motion, the Attorney General suggests that his presentation of an argument pre-empts any other, confining the attention of this Court to him alone. The Division deprecates that suggestion; the granting of the Division's motion does not detract from the Attorney General's argument and avoids deciding, for any purpose, state law questions not germane to the substance of these cases, not reviewed by the state courts and not adequately briefed to this Court.

Dated: New York, N.Y.
July 23, 1982

Respectfully submitted,

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Reply Brief

3

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WERNER H. KRAMARSKY, *etc., et al.*,
Appellants,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Second Circuit

RESPONSE OF THE NEW YORK STATE ATTORNEY GENERAL TO MOTION FOR DIVIDED ARGUMENT AND PERMISSION TO FILE A SEPARATE BRIEF AND APPENDIX

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TABLE OF CONTENTS

	PAGE
Table of Authorities	II
Preliminary Statement	1
Point I—The Practices of This Court, and the State of New York Before This Court, Dictate Denial of the Motion	3
Point II—New York Statutes Plainly Empower the Attorney General to Resolve the Issue Movants Have Put to the Court	5
Conclusion	9

TABLE OF AUTHORITIES

PAGE

Cases:

Carter v. Carter, 58 A.D.2d 438 (2d Dept. 1977) 8
Committee For Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 5

New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519 (1979) 5

People v. Tru-Sport Publishing Co., Inc., 160 Misc. 628 (Sup. Ct. N.Y. Co. 1936) 6
People of the State of New York v. 11 Cornwell Co., 508 F. Supp. 273 (E.D.N.Y. 1981), *appeal pending*, No. 82-7084 7
People of the State of New York v. New York City Transit Authority, 28 EPD ¶ 32,541 (Sup. Ct. N.Y. Co. 1981), *appeal pending*, No. 19550/81 7

The People ex rel. Peabody v. The Attorney General, 22 Barb. 114 (Sup. Ct. Alb. Co. 1856) 6

Warren v. Goldstein, 105 N.Y.S.2d 159 (Sup. Ct. N.Y. Co. 1951) 6

Constitution:

N.Y. Constitution Art. V, § 1 5
N.Y. Constitution Art. V, § 4 5

Statutes:

Federal:

28 U.S.C. § 2403(b) (1978) 8

PAGE

State:

N.Y. Civ. Prac. Law and Rules § 1012(b) (McKinney 1976) 8
N.Y. Executive Law § 4 (McKinney 1972) 7
N.Y. Executive Law § 63 (McKinney 1972) 6, 7
N.Y. Executive Law § 63.1 (McKinney 1972) 5, 6, 7
N.Y. Executive Law § 63.9 (McKinney 1972) 7, 8
N.Y. Executive Law § 67 (McKinney 1972) 2
N.Y. Executive Law § 71 (McKinney 1972) 8
N.Y. Executive Law, Art. 15 (McKinney 1972 & Supp. 1980-1981) (Human Rights Law) ("HRL") ..... *passim*
HRL § 295 6
HRL § 295.3 6
HRL § 298 6

Legislative History:

1801 N.Y. Laws, ch. 47, § III 6
1892 N.Y. Laws, ch. 683, Art. V 6
1935 N.Y. Laws, ch. 523 6
§ 1, ch. VIII, Title V, 1 Rev. Stats. of New York (1829) 6
1 Rev. Stats. of New York (1895), Executive Law, Art. V, § 52(1) 6
Letter of Assemblyman Austin (April 13, 1935) (Bill Jacket) 6
Letter of Attorney General Bennett (April 15, 1935) (Bill Jacket) 6

Preliminary Statement

Appellants Kramarsky, Anderson and the New York State Division of Human Rights (collectively referred to as "the Division" or "the movants") have moved for permission to present oral argument separately in this Court, as well as to file their own appendix[1] and brief. The Attorney General of the State of New York, attorney for all appellants, submits this response in opposition to the motion in all respects. There is no reason to depart from this Court's practice disfavoring separate oral arguments (Rule 38.4, Supreme Court Rules). Even more fundamentally, there is no reason to permit split representation of appellant state agencies and officials.

This appeal presents important questions of constitutional and statutory interpretation involving the interrelationship of federal and state law. Specifically, this Court is asked to decide whether the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461 (1975 & Supp. 1976-1981) preempts either of two state laws, the New York Human Rights Law (N.Y. Exec. Law, Art. 15 (McKinney 1972 & Supp. 1980-1981)) ("HRL") or the New York Disability Benefits Law (N.Y. Work. Comp. Law, Art. 9 (McKinney 1965 & Supp. 1981-1982)) ("DBL"). In the courts below,[2] several New York

1. The movants characterize the appendix they submit as a "joint appendix" and list the Attorney General on its cover, even though they know that the Attorney General explicitly declined to consent to its contents or the separate submission. A joint appendix and brief have previously been filed on behalf of all appellants by the Attorney General.

2. Three separate district court actions, Delta Air Lines, Inc., *et al.* v. Kramarsky, *et al.*, Metropolitan Life Ins. Co. v. Kramarsky, *et al.*, and Burroughs Corp. v. Kramarsky, were combined in the Court of Appeals and in this Court because of the identity of issues presented.

State agencies and officials[3] opposed employers seeking to be relieved of their obligations under both state laws to provide benefits to female employees disabled as a result of pregnancy.

In these courts, the Attorney General represented the Workers' Compensation Board and its Chairman. At certain stages of the litigation, the Attorney General also represented the Division; at other stages, the Attorney General, after discussion with the Division, authorized that agency to appear by its own counsel.[4] In this Court, pursuant to historic practice, the Attorney General filed a notice of appearance and a jurisdictional statement on behalf of all appellants. (With the authorization of the Attorney General, the Division's counsel appeared on the jurisdictional statement as co-counsel for the Division.[5]) On July 2, 1982, the Attorney General filed a brief on behalf of all appellants, and a joint appendix. The brief embodies the State of New York's arguments that ERISA does not preempt the HRL or DBL.

Points I and II below set forth alternative bases for denying this motion.

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3. In addition to the state agencies and officials who are appellants in this Court, the New York Human Rights Appeal Board was also a defendant in the *Delta* action.

4. The Attorney General, of course, may at any stage authorize other counsel, whether in the State's employ or otherwise, to represent state agencies or officials. N.Y. Exec. Law § 67. The duration and necessity of such an authorization are matters entrusted to the discretion of the Attorney General.

5. In addition, after this Court noted probable jurisdiction, the Attorney General paid the docketing fee for all appellants and obtained an extension of all appellants' time to serve and file their brief and joint appendix.

POINT I

The Practices of This Court, and of the State of New York Before This Court, Dictate Denial of the Motion.

Whether or not the DBL and the HRL are preempted by ERISA involves issues of constitutional interpretation and statutory construction, especially focusing on congressional intent. These issues are of critical importance to all New York's workers. At stake here is the ability of New York's workers to redress fully employment discrimination, administratively or judicially. A finding of preemption would, at a minimum, leave those workers vulnerable to discrimination in employee benefit plans by employers with fewer than 15 employees and, indeed, to any type of discrimination in employee benefit plans not specifically prohibited by federal law.

There has never been any conflict of interest among the various state appellants, or any inconsistency among them as to the legal position of the State, its agencies and officials. There is no reason, then, why New York State cannot and should not speak with one voice before this Court: the voice of the State's chief legal officer, the Attorney General.

There is virtually no case in which particular state agencies and officials do not have some special subject area expertise, as movants argue they have.[6] But that conten-

6. Ironically, however, the arguments contained in the movants' proposed brief do not at all derive from the expertise they cite in their motion—familiarity with agency procedures and interpretations. Rather, they address issues of constitutional and statutory interpretation, application of Supreme Court precedent, and questions of federal court jurisdiction and appropriate remedies—in other words, arguments for which the agency can claim *no* special expertise.

tion proves too much and too little. Many New York State agencies and officials, in addition to those now before the Court, might have been termed nominal parties insofar as they administer programs under the two challenged laws or under other laws susceptible to an ERISA preemption challenge. All of those agencies and officials are affected by the decision in this case, possess an expertise in their program area, and might conceivably add constructively to the debate before the Court.

However, in the final analysis, the real party in interest here is clearly the State itself. The lawsuits constitute a frontal challenge to the constitutional validity of its statutes, and by law and practice the Attorney General must meet that challenge. On behalf of the State of New York, he must put before this Court a coherent, unitary legal argument which, incorporating the experience and perspective of all state entities, best presents the State's case. It is the Attorney General's obligation to forge such a legal position from among the available expertise, legal arguments and strategies.

To permit different state agencies and officials to file briefs and argue separately in this Court, absent any showing or allegation of a conflict of interest on the part of the State's chief legal officer, would foreseeably subject the Court to largely irrelevant appeals based on agencies' understandable fondness for arguments based on administrative convenience or necessity. Equally important, it would wreak havoc on a state's ability to develop and present the legal position which best incorporates the interests of all its affected agencies and residents. To avoid such prob-

lems, the Attorney General has traditionally represented all New York State agencies and officials before this Court. *See, e.g., New York Telephone Co.* v. *New York State Department of Labor*, 440 U.S. 519 (1979) (Attorney General represented State Department of Labor, State Department of Taxation and Finance, Industrial Commissioner, and Commissioner of Taxation and Finance); *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973) (Attorney General represented Commissioner of Education, Commissioner of Taxation and Finance, and Comptroller).

POINT II

New York Statutes Plainly Empower the Attorney General to Resolve the Issue Movants Have Put to the Court.

The Attorney General is New York State's elected chief legal officer. The office of the Attorney General, established in Article V, §§ 1 and 4 of the New York State Constitution, has the duty and authority to

> Prosecute and defend all actions and proceedings in which the state is interested, *and have charge and control of all the legal business of the departments and bureaus of the state*, or of any office thereof which requires the services of attorney or counsel, in order to protect the interest of the state . . .

N.Y. Exec. Law § 63.1 (McKinney 1972) (emphasis supplied). The only exception to this mandated duty and authority arises with respect to state military departments.

Id.[7] In order to implement the mandate of § 63, state agencies must notify the Attorney General of all legal actions they seek to prosecute or defend. *Id.*[8]

The movants rest their authority to appear separately in this Court on HRL §§ 295.3 and 298. Neither section provides the litigating authority the Division seeks. HRL § 295.3 merely grants the Division the power to appoint attorneys as "house counsel" but does not describe the proceedings in which those attorneys may appear. Indeed, § 295, which sets forth the "functions, powers and duties" of the Division, does not give the Division the power to appear by its own attorney in judicial proceedings. Section 298 permits the Division to appear in court by its attorneys, but only in actions initiated in the Appellate Division of the New York Supreme Court to enforce or annul administrative orders of the Human Rights Appeal Board or the Division's Commissioner. This is not such a case.

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7. Executive Law § 63.1 codifies the Attorney General's historic common law power to represent the sovereign in both affirmative and defensive litigation. People v. Tru-Sport Publishing Co., Inc., 160 Misc. 628, 637 (Sup. Ct. N.Y. Co. 1936), a power that has been explicitly recognized by the New York Legislature since 1801. *See* ch. 47, § III, 1801 Laws of New York; § 1, ch. VIII, Title V, 1 Rev. Stats. of New York (1829); ch. 683, Art. V, 1892 Laws of New York; 1 Rev. Stats. of New York (1895), Exec. Law, Art. V, § 52(1). *See also* The People ex rel. Peabody v. The Attorney General, 22 Barb. 114, 118 (Sup. Ct. Alb. Co. 1856); Warren v. Goldstein, 105 N.Y.S.2d 159, 160 (Sup. Ct. N.Y. Co. 1951).

8. This notification provision was enacted in 1935 (1935 N.Y. Laws, ch. 523) to avoid ". . . instances where the attorney-general by virtue of greater competence and better equipped legal machinery, may have averted the disastrous outcome detrimental to the state." Letter of Assemblyman Austin (April 13, 1935) (Bill Jacket); *See* Letter of Attorney General Bennett (April 15, 1935) (Bill Jacket). The Legislature contemplated that, once notification was given, the Attorney General would take "charge and control" of the litigation under § 63.1.

The movants claim to draw further support for their position from Executive Law § 63.9.[9] Section 63, however, relates to the Attorney General's authority to sue, and not at all to the authority of state agency clients to represent themselves. Under § 63.9, the Attorney General may institute or defend a civil rights suit at the behest of his client, the Division.[10] However, under § 63.1, the Attorney General, with or without the request of a state agency, has the duty to "prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state . . . ." And the Attorney General does so regularly, *i.e.*, he institutes civil rights actions without a referral or a request from the Division. *See, e.g., People of the State of New York* v. *New York City Transit Authority*, 28 EPD ¶ 32,541 (Sup. Ct. N.Y. Co. 1981), *appeal pending*, No. 19550/81 (employment discrimination); *People of the State of New York* v. *11 Cornwell Co.*, 508 F. Supp. 273

9. Movants make one vague reference to preparation of a brief "pursuant to instructions approved by the Governor's office" (Motion Under Rule 38.4 For Divided Argument at 3). Even if there were conflict between the State's elected officials, it would be, strictly speaking, irrelevant. The question here is the agency's statutory authority to represent itself when the Attorney General has elected to appear on its behalf, and none of the relevant statutes makes any reference to gubernatorial authorization as bearing on this question. However, the effort also is unavailing for a simpler reason: the Governor's Counsel, his statutory advisor on legal matters (Exec. Law § 4), has informed the Attorney General's office that his office gave no such approval.

10. Whether the Attorney General *must* institute an action upon a referral from the Division was an issue hotly debated after § 63.9 was passed. The conclusion was that the Attorney General was not so obligated and the phrase "in his judgment" remains. § 63.9 is most sensibly read as a prod that reflects the historical context at the time it was enacted. It is an alternate means of causing appropriate civil rights cases to be brought or defended by the Attorney General.

(E.D.N.Y. 1981), *appeal pending*, No. 82-7084 (housing discrimination). Thus, the movants' reliance on the absence of a client request under § 63.9 misses the point.[11] The Attorney General can, on his own initiative, represent the State, its agencies and officials in *any* matter in which they are interested, at least as long as there is no conflict of interest among his clients.

Where the constitutionality of a state statute is called into question, these considerations are particularly compelling. New York statutory law obligates the Attorney General to defend the constitutionality of its statutes, and mandates state courts to permit appearance by the Attorney General in such cases. N.Y. Exec. Law § 71; *Carter* v. *Carter*, 58 A.D.2d 438, 442 n.1 (2d Dept. 1977).[12] Similarly, when the constitutionality of a state statute is involved in an action in which the State is not a party, the court must notify the Attorney General, and permit him to intervene as a party. N.Y. Civ. Prac. Law and Rules § 1012(b) (McKinney 1976). *See also* 28 U.S.C. § 2403(b) (1978) (requiring courts of the United States to notify the state's attorney general when an action in which the state or its officers are not parties calls into question the constitutionality of a state statute).

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11. The "legislative history" cited by movants also fails to support their position (Motion Under Rule 38.4 For Divided Argument at 3, n. *). The one document cited merely recognizes that § 63.9 would not disturb the Division's powers under the HRL.

Further, by its terms § 63.9 does not apply at all to this case, which involves discrimination on the basis of sex.

12. The court in *Carter* held that ". . . it is clear that the court in which an issue of the constitutionality of a statute is raised has no power to dispense with notification to the Attorney-General, since the purpose of the statute is to have all of the people of the State represented when the constitutionality of their laws is put in issue." 58 A.D.2d at 442 n.1.

These statutes embody a familiar, clear state policy which is also reflected in this Court's historic practices. Issues involving the compatability of acts of the State Legislature with the federal Constitution should be addressed and directed by the State's chief legal officer, an elected official whose legal expertise and scope of accountability are far broader than those of his clients, the appointed agency heads.

Conclusion

For the reasons stated above, the motion should in all respects be denied.

Dated: New York, New York
July 14, 1982

Respectfully submitted,

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Docket Sheet

NO. 81-1578-AFX	TITLE Robert R. Shaw, Acting Commissioner, ~~Werner H. KRAMARSKY~~, etc., et al., Appellants v. Delta Air Lines, Inc., et al.

DOCKETED	COURT
Feb. 22, 1982	United States Court of Appeals for the Second Circuit

DATE	PROCEEDINGS AND ORDERS
RULE 10.6 case	Counsel for Appellants: Peter Bienstock Counsel for Appellees: Gordon Dean Booth, Jr., Jeffrey A. Mishkin, Robert C. Bernius
Feb. 22, 1982	Statement as to jurisdiction filed. (Record filed).
Feb. 22, 1982	Appendix filed.
Mar. 26, 1982	Motion of appellee Airlines to affirm or dismiss filed.
Mar. 29, 1982	Motion of appellee Burroughs Corporation to affirm filed.
Mar. 29, 1982	Motion of appellee Metropolitan Life Insurance Company to dismiss or affirm filed.
Mar. 31, 1982	DISTRIBUTED. 4-16.
Apr. 19, 1982	Probable jurisdiction NOTED.

Apr. 28, 1982	Order extending time to file the joint appendix and appellants' brief on the merits until July 3, 1982.
July 1, 1982	Joint appendix filed.
July 1, 1982	Brief for the appellants filed.
July 2, 1982	Brief, amici curiae, of Commonwealths of Pennsylvania and Massachusetts and Sixteen States filed.
July 6, 1982	Brief, amici curiae, of The American Civil Liberties Union, et al. filed.
July 2, 1982	Motion of American Federation of Labor and Congress of Industrial Organizations, et al. for leave to file a brief as amici curiae filed.
July 15, 1982	Order extending time to file the appellees' brief on the merits until Sept. 1, 1982.
July 6, 1982	Motion of appellants Werner H. Kramarsky, et al. for divided argument and for leave to file separate brief and joint appendix. (annexed).
July 15, 1982	Opposition to above motion filed by Attorney General of New York filed.
July 19, 1982	Response of Appellee Airlines to motion for divided argument filed.
July 26, 1982	Reply of the New York State Division of Human Rights to the response of the Attorney General filed.
Aug. 11, 1982	Order further extending time to file the appellees' brief on the merits for a period of three weeks from the date of the Court's ruling on motion of Kramarsky et al for divided argument and for leave to file separate brief and joint appendix.

(Over)

81-1578

Title

No.

DATE	PROCEEDINGS AND ORDERS
	2nd case: Werner H. Kramarsky, etc., Appellant v. Burroughs Corporation
	3rd case: Werner H. Kramarsky, etc., et al., Appellants v. Metropolitan Life Insurance Company
Aug. 30, 1982	Brief, amicus curiae, for the U. S. filed.
Sept. 9, 1982	The motion of American Federation of Labor and Congress of Industrial Organizations, et al. for leave to file a brief as amici curiae is GRANTED. The motion of appellants Werner H. Kramarsky, et al. for divided argument and for leave to file separate brief and joint appendix is DENIED.
Sept. 16, 1982	Order extending time to file the appellees' briefs on the merits until Oct. 14, 1982.
Sept. 29, 1982	Brief, amicus curiae, of Westinghouse Electric Corporation in support of appellees filed.
Sept. 30, 1982	Brief, amicus curiae, of The Erisa Industry Committee (ERIC) and the Equal Employment Advisory Council (EEAC) in support of appellees filed.
Oct. 14, 1982	Brief of appellee Airlines filed.
Oct. 18, 1982	Brief of appellee Burroughs Corporation filed.
Oct. 18, 1982	Brief of appellee Metropolitan Life Insurance Company filed.
Nov. 17, 1982	CIRCULATED.
Dec. 22, 1982	Reply brief for the appellants filed. (D).
Jan. 10, 1983	ARGUED.